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The object of the present work is to state in a clear and concise form the principles of Hindu Law as established by judicial decisions. The principles are stated in the form of numbered sections and they have been elucidated, wherever it was thought necessary, by apt illustrations drawn from decided cases. In fact the present work has been written on the lines of the author's "Principles of Mahomedan Law." Two new chapters have been added, one on the Law of Damdupat and the other on Benami Transactions.

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PREFACE TO THE THIRD EDITION.

THE present edition has been thoroughly revised and the decisions have been brought up to the end of 1917.

Since the publication of the last edition several amendments have been made in the body of the Code. Further, many new Rules have been framed by the High Courts of Calcutta, Bombay, Madras and Allahabad and by the Chief Courts of the Punjab and Lower Burma under section 122 of the Code. These are to be read as part of the Code in the particular province for which they are made, and they are set out in Appendices I to V, except the Rules made by the Chief Court of Lower Burma. These rules have been brought down to the end of 1917. I have to express my deep obligations to the Registrars of the said Courts for the assistance kindly rendered to me by furnishing me with copies of the said Rules and complete information in connection with them.

There are in all eight Appendices to the First Schedule, all containing forms. From these I have selected about 25 forms which I thought were important for students.

For the guidance of students I have prepared a Summary of the Code of Civil Procedure in the form of Lectures, and called it "The Key to Indian Practice." In these Lectures I have followed the course of an ordinary suit from the moment the plaint is presented until an appeal is preferred to the Privy Council. The price of "The Key" is Rs. 1 per copy.

It is, indeed, with great reluctance that I have increased the price of the present volume. The enormous increase in the cost of printing rendered it inevitable.

My thanks are due to Mr. A. M. Masani, of the Middle Temple, but for whose assistance the present edition would not have been ready by this time.

D. F. M.

GRESHAM BUILDINGS,
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January, 1918.

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THE
CODE OF CIVIL PROCEDURE.
ACT V OF 1908.

RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL
ON THE 21ST MARCH 1908.

*An Act to consolidate and amend the laws relating to the
Procedure of the Courts of Civil Judicature.*

WHEREAS it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature :
It is hereby enacted as follows :—

Preliminary.

Short title, commence
ment and extent.

1. (1) This Act may be cited as the
Code of Civil Procedure, 1908.

(2) It shall come into force on the first day of January
1909.

(3) This section and sections 155 to 158 extend to the
whole of British India : the rest of the Code extends to the
whole of British India, except the Scheduled Districts.

Interpretation of the Act.—The first Code of Civil Procedure was passed in the year 1859, and it was repealed by the Code of 1877. The Code of 1877 was repealed by the Code of 1882 which, in its turn, has been repealed by the present Code. It will be seen from the Preamble that the present Act not only defines and amends but also *consolidates* the law of civil procedure. When a question, therefore, arises as to the construction of a section in the Code, the proper course is in the first instance to *examine the language of the Act and to ask what is its natural meaning*. If the meaning is plain it is not proper to have recourse to the *previous state of the law*, and the language of the Act must be interpreted uninfluenced by any considerations derived from the *previous state of the law*. But if the meaning be doubtful, resort may be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the Act (a).

(a) *Bank of England v. Pagliaro* [1891] A. C. 107, 144-145; *Administrator-General v. Premalal* (1895) 22 Cal. 788, 22 I. A. 107; *Dorevra v. Kanul Basani* (1896) 23 Cal. 563, 23 I. A. 18.

The Code, being a Code of *practice* and *procedure*, is *retrospective* in its operation. It therefore applies even to suits and other proceedings instituted before the date on which it came into force (b).

British India.—The expression “British India” is not defined in the Code. In the absence of any definition of a particular expression in an Act, we are to turn to the definition of it in the General Clauses Act X of 1897. There are several terms of frequent or *general* occurrence in several Acts, and these are defined in the General Clauses Act. “British India” is one of them, and it is defined in that Act (s. 3, cl. 17) as meaning “all territories and places within His Majesty’s dominions which are for the time being governed by His Majesty through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India.” The question whether a particular place is within the limits of British India is often of importance in relation to the provisions of O. 25. r. 1 [Code of 1882, s. 380]. Note that Aden is within British India (c), but that Singapore is not (d), nor is the Civil Station at Wadhwan (e).

Scheduled Districts.—A list of Scheduled Districts is given in *Schedule I* to the Scheduled Districts Act XIV of 1874. The sections of this Code, except s. 1 and ss. 155 to 158, do not extend to any of the Scheduled Districts. Section 5, however, of the Scheduled Districts Act empowers the Local Government, with the sanction of the Governor-General in Council, to extend to any of the Scheduled Districts any enactments in force in British India, and the whole of the Procedure Code has accordingly been extended to several Scheduled Districts including Sindh, Ajmere, Merwara and the Scheduled Districts of the Punjab.

2. In this Act, unless there is anything repugnant in the
Definitions. subject or context,—

(1) “Code” includes rules :

(2) “decree” means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or section 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order. or

(b) any order of dismissal for default.

(a) Maxwell on the Interpretation of Statutes, Chap. viii. sec. iv.; Craik on Statute Law, pp. 327-328; *Harat Akramnissa v. Vakulnissa* (1894) 18 Bom. 429; *Balrishna v. Bapu* (1895) 19 Bom. 429; *Girish Chandra*

v. Apurba (1894) 21 Cal. 940, 955.

(c) Aden Laws Regulation, 1891, s. 2.

(d) Straits Settlement Act, 1866, s. 1.

(e) *Emperor v. Chimanlal* (1912) 14 Bom. L. R. 870.

S. 2.

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final :

(3) “decree-holder” means any person in whose favour a decree has been passed or an order capable of execution has been made :

Distinction between decree and order.—Every decree is appealable unless it is expressly provided that no appeal shall lie from it. But every order is not appealable. Only those orders are appealable that are specified in s. 104 and in O. 43, r. 1.

Preliminary decree.—A decree may be preliminary or final or it may be partly preliminary and partly final. A decree is preliminary when the adjudication, though it determines the *rights* of the parties with regard to the matters in controversy in the suit, *does not completely dispose of the suit*, and further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. As to appeals from decrees, see ss. 96 and 97.

The question whether a decision amounts to a preliminary decree is one of considerable importance in view of the provisions of s. 97 by which it is provided that if a party aggrieved by a preliminary decree does not appeal therefrom within the period of limitation allowed for appeals, he shall be precluded from disputing its correctness in an appeal from the final decree. It has been recently held by a Full Bench of the Bombay High Court that a decision that the matters in dispute in a suit are *not* caste questions, and are not therefore outside the jurisdiction of Civil Courts, does not amount to a preliminary decree, from which an appeal can lie (*f*), see notes to s. 9.

Illustrations.

1. A sues B for cancellation of a document, and a decree is passed in the suit. This is a final decree, for the suit is completely disposed of.

2. A suit is brought by one partner against another for a dissolution of the partnership and for the taking of partnership accounts. Here the Court may pass a *preliminary* decree declaring the proportionate shares of the parties, and directing such accounts to be taken as it thinks fit, and, after the accounts are taken, it may pass a *final* decree directing payment of debts due by the partnership, the costs of the suit, and to the parties the amount found due to them on taking the accounts. See O. 20, r. 15.

3. A sues B for the recovery of possession of certain immoveable property and for mesne profits. The Court may pass a decree for the possession of the property, and direct inquiry as to mesne profits. Here the decree is partly final and partly preliminary. It is final so far as it directs delivery of possession to A. It is preliminary so far as it directs an inquiry as to mesne profits. After the enquiry is completed, the Court has to pass a final decree in respect of mesne profits in accordance with the result of the inquiry. See O. 20, r. 12.

(*f*) *Channalsurmi v. Gangadharappa* (1914) 39 Bom. 339.

3. 2. § For cases in which a preliminary decree may be passed under this Code, see O. 20. rr. 12-18, and O. 34, rr. 2, 4, 7.

Rejection of plaint.—As to an adjudication rejecting a plaint it has been expressly provided by the present clause that it shall be deemed to be a decree. Such adjudication, therefore, is appealable as a decree. An appeal, however, is not the only remedy open to a party whose plaint is rejected, for he may cure the defect for which the plaint was rejected and present a fresh plaint (O. 7, r. 1²). As to the cases in which a plaint “shall” be rejected, see O. 7, r. 11.

Order returning plaint.—A plaint may be returned for amendment (O. 6, r. 17) or to be presented to the proper Court (O. 7, r. 10). In either case the decision returning the plaint is an order as distinguished from a decree. An order returning a plaint to be presented to the proper Court is appealable [O. 43, r. 1, cl. (a)]. An order returning a plaint for amendment is not appealable.

Adjudications appealable as orders.—An adjudication which is appealable as an order under s. 10¹ and O. 43, r. 1, is not a decree.

Order of dismissal for default.—It is provided by O. 9, r. 8, that where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed. Such an order, it is enacted by the present section, is not within the definition of decree, and is not therefore appealable. The same rule applies to an order dismissing an appeal for default: see O. 41, rr. 11 (2), 17.

(4) “district” means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a “District Court”), and includes the local limits of the ordinary original civil jurisdiction of a High Court :

(5) “foreign Court” means a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor-General in Council :

The Privy Council is not within this definition, for though it is situate beyond the limits of British India, it is invested with judicial authority within it (g). But the High Court of Justice in England, whether it be the Chancery Division (h) or the King’s Bench Division (i), is a foreign Court. The Ceylon Court is also a foreign Court (j).

(6) “foreign judgment” means the judgment of a foreign Court :

(7) “Government Pleader” includes any officer appointed by the Local Government to perform all or any of

(a) *Houles v. Bortles* (1884) 9 Bom. 571.

(b) *London Bank v. Hornumji* (1871) 8 B. II. C.

200.

(g) See *Deep Narain v. Dietert* (1904) 31 Cal. 274.

(j) *Shah Adam v. Darud* (1909) 32 Mad. 479, 471.

the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader : S. 2.

(8) "Judge" means the presiding officer of a Civil Court :

No judge can act in any matter in which he has any pecuniary interest, nor where he has any interest, though not a pecuniary one, sufficient to create a real bias (*k*).

(9) "judgment" means the statement given by the Judge of the grounds of a decree or order :

(10) "judgment-debtor" means any person against whom a decree has been passed or an order capable of execution has been made :

(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued :

Where a party sues in a representative character.—A suit by a Hindu reversioner for a declaration that an alleged adoption is not valid is a suit by him in a "representative character," that is, as representing, in his reversionary right, the estate of the last male owner, and on his death such right devolves on the next reversioner so as to entitle him to be substituted as plaintiff under O. 22, r. 3 (*l*).

(12) "mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession :

See notes to O. 20, r. 12.

(13) "moveable property" includes growing crops :

(14) "order" means the formal expression of any decision of a Civil Court which is not a decree :

(15) "pleader" means any person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court :

(*k*) *Allo v. Gaqubha* (1895) 19 Bom. 608.
(*l*) *Vendatamarayana v. Subbammal* (1915) 38

Mad. 406, 42 I. A. 125; *Gandi v. Puramsetti* (1916) 39 Mad. 382.

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“ **Pleader.** ”—The term “pleader” is here used in a much larger than its ordinary signification as a convenient term to designate all persons who are entitled to *plead* for another in Court. “Pleader.” in its ordinary sense, is synonymous with “*Vakil*” (m)

Authority to compromise, etc.—An attorney or solicitor is entitled, in the exercise of his discretion, to enter into a compromise, on behalf of his client, if he does so in a *bond fide* manner (n). And so is counsel (o). But a pleader cannot enter into a compromise on behalf of his client without his client’s *express* authority (p). The law is the same as regards reference to arbitration and withdrawal of suits.

Power to bind client by admissions.—Counsel (q), solicitors (r), and pleaders or Vakils (s) have an implied authority to bind their clients by admissions of *fact*, provided such admissions are made during the actual progress of litigation and not in mere conversation (t). Thus an admission of liability by a Vakil, solicitor or counsel is sufficient to warrant a decree against his client in the suit (u). The result is that the client will be bound by the admission, even though it may be erroneous. But neither counsel nor solicitor nor Vakil can bind his client by an admission on a point of *law*. Hence if the admission be erroneous, the client is free to repudiate it (v). It may here be observed that the omission of a pleader or counsel either to argue a question of *law*, or his abandoning a question of *law* does not disentitle the Court to go into the question (w).

Power to abandon issue.—A pleader’s general powers in the conduct of a suit include the power to abandon an issue which, in his discretion, he thinks it inadvisable to press (x).

(16) “prescribed” means prescribed by rules :

(17) “public officer” means a person falling under any of the following descriptions, namely :—

(a) every Judge ;

(b) every member of the Indian Civil Service ;

(c) every commissioned or gazetted officer in the military or naval forces of His Majesty, including His Majesty’s Indian Marine Service, while serving under the Government :

(m) *Pleader of the High Court, in re* (1884) 8 Bom 145.

(n) *Fray v. Youles* (1859) 1 B & B 839 ; *Iqbalnathdas v. Ramdas* (1870) 7 B H U, O C 79.

(o) *Kempshall v. Holland* (1895) 14 R. 336.

(p) *Jagupati v. Ekambara* (1898) 21 Mad 274.

(q) *Haller v. Worman* (1860) 2 T & F. 163, *Van Wart v. Wolley* (1823) Ry. and Mov. 4, *Stracy v. Blake* (1836) 1 M. and W. 188.

(r) *Wagstaff v. Watson* (1833) 4 B. & Ad. 339, *Petch v. Lyon* (1846) 9 Q. B. 147.

(s) *Kower Narain v. Sreenath* (1868) 9 W. R. 485, *Rajunder v. Bijar* (1839) 2 M. I. 1.

253; *Hingal Lal v. Mansa Ram* (1896) 18 All 384; *Venkata v. Bhashyakartu* (1899) 22 Mad. 688.

(t) *Young v. Wright* (1807) 1 Cam 139; *Parkins v. Hawkshaw* (1817) 2 St. 239; *Petch v. Lyon* (1846) 9 Q. B. 147.

(v) *Sreemutty Dossee v. Pitamber* (1874) 21 W. R. 332.

(w) *Dwar Bux v. Fakir* (1898) 3 O. W. N. 222 (pleader), *Bem Pershad v. Dudhnath* (1900) 27 Cal. 156, 28 I. A. 216 (counsel).

(x) *Bem Pershad v. Dudhnath* (1900) 27 Cal. 156.

(z) *Venkata v. Bhashyakartu* (1902) 25 Mad. 367, 377 [P. C.]

- (d) every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order, in the Court, and every person especially authorized by a Court of Justice to perform any of such duties :
- (e) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ;
- (f) every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience ;
- (g) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue-process, or to investigate, or to report on, any matter affecting the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government ; and
- (h) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty :

(18) " rules " means rules and forms contained in the First Schedule or made under section 122 or section 125 .

The true scope of Rules.—" The body of the Code is fundamental and is unalterable except by the legislature ; the rules are concerned with details and machinery and can be more readily altered. Thus it will be found that the body of the Code creates *jurisdiction*, while the rules indicate the *mode* in which it is to be exercised. It follows that the body of the Code is expressed in more *general* terms, but it has to be read in conjunction with the *more particular* provisions of the rules " (y).

Ss. 2-5. (19) "share in a corporation" shall be deemed to include stock, debenture stock, debentures, or bonds : and

(20) "signed," save in the case of a judgment or decree, includes stamped.

3. For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court.

Different rulings of different High Courts.—Where there are different rulings of different High Courts on a particular point, a Judge should follow the ruling of the High Court to which he is subordinate (:).

4. (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed by or under any other law for the time being in force.

(2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land.

5. (1) Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure upon which any special enactment applicable to them is silent, the Local Government, with the previous sanction of the Governor-General in Council, may by notification in the local official Gazette, declare that any portions of those provisions which are not expressly made applicable by this Code shall not apply to those Courts, or shall only apply to them with such modifications as the Local Government, with the sanction aforesaid, may prescribe.

(*) *Korban Ally v. Sharada Prasad* (1884) 10 Cal. 82 : *Swaminar v. Kashinath* (1891) 15 Bom. 410 ; *Bataji v. Sakharani* (1893) 17 Bom. 535.

(2) "Revenue Court" in sub-section (1) means a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature.

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6. Save in so far as is otherwise expressly provided, Pecuniary jurisdiction nothing herein contained shall operate to give any Court jurisdiction over suits, the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction.

7. The following provisions shall not extend to Courts constituted under the Provincial Small Causes Courts Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say,—

(a) so much of the body of the Code as relates to—

(i) suits excepted from the cognizance of a Court of Small Causes ;

(ii) the execution of decrees in such suits ;

(iii) the execution of decrees against immovable property ; and

(b) the following sections, that is to say,—

section 9,

sections 91 and 92,

sections 94 and 95 so far as they relate to injunctions and interlocutory orders, and

sections 96 to 112 and 115.

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8. Save as provided in sections 24, 38 to 41, 75, clauses (a), (b) and (c), 76, 77 and 155 to 158, and by the Presidency Small Cause Courts Act, 1882, the provisions in the body of this Code shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay :

Provided that—

- (1) *The High Courts of Judicature at Fort William, Madras and Bombay, as the case may be, may from time to time, by notification in the local official Gazette, direct that any such provisions not inconsistent with the express provisions of the Presidency Small Cause Courts Act, 1882, and with such modifications and adaptations as may be specified in the notification, shall extend to suits or proceedings or any class of suits or proceedings in such Court.*
- (2) *All rules heretofore made by any of the said High Courts under section 9 of the Presidency Small Cause Courts Act, 1882, shall be deemed to have been validly made.*

The provisos to the section were added to the section by the Code of Civil Procedure Amendment Act I of 1914, s. 2.

PART I.

Suits in General.

JURISDICTION OF THE COURTS AND RES JUDICATA.

9. The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Courts to try all civil suits unless barred.

Explanation.—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

Suits of a civil nature.—Suits may be divided into two classes—(1) those which are of a civil nature, and (2) those which are not of a civil nature. It is suits only of a civil nature which a civil Court has jurisdiction to entertain. A civil Court has no jurisdiction to try suits which are not of a civil nature. A suit is *not* of a civil nature, if the principal or only question in the suit is a caste question or a question relating to religious rites. But when (1) a caste question or a question relating to religious rites is not the principal question in the suit, but is merely a subsidiary question, and (2) *the principal question is of a civil nature, e.g., a question as to the right to property or to an office or to any other civil right, and (3) the principal question which is of a civil nature cannot be determined without deciding the caste question or question relating to religious rites, the Court will in such a case decide the caste question or the question relating to religious rites to enable it to decide the principal question (a).* It is upon this principle that the *Explanation* to the section is based.

Suits in which the principal question is a caste question are not suits of a civil nature.—A caste is any well defined native community (be it Hindu or Mahomedan) governed for certain internal purposes by its own rules and regulations (b). A caste question is one which relates to matters affecting the internal autonomy of the caste and its social relations (c).

To determine whether or not a question is a caste question, the test is—Would the cognizance of the matter in dispute by the Court be an interference with the autonomy of the caste? Would the Court be deciding the question which the caste as a self-governing body is entitled to decide for itself? If yes, the question is a caste question, and no civil Court has jurisdiction to entertain it (d). Thus a caste may pass a resolution

(a) *Lalji v. Wakfi* (1895) 10 Bom. 507; *Praji v. Govind* (1887) 11 Bom. 534.
(b) *Abdul Kadir v. Dharmia* (1896) 20 Bom. 190.
(c) *Appaya v. Padappa* (1890) 23 Bom. 122, 130;

Jethabhai v. Chapsey (1909) 34 Bom. 467, 481.
(d) *Murari v. Suba* (1882) 6 Bom. 725, 727.

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depriving a member of man-pau invitation, or invitation to dinner or to munj or other ceremonies for an alleged breach of a caste rule. The excluded member has no remedy in law for all that he has lost is a social privilege, and not a legal right, and the caste is the only tribunal to which a casteman deprived of that privilege could resort. A civil Court has no power by its decree to compel the members of a caste to invite a casteman to dinner or to any ceremony (e).

Expulsion from caste.—To exclude a member of a caste from invitation to caste dinners or ceremonies is, as stated above, to deprive him of a social privilege. But to expel him from the caste is to deprive him of a legal right which forms part of his status. Hence a suit will lie for a declaration that the plaintiff is entitled to be re-admitted into the caste and also for damages for expulsion from the caste (f), provided the excommunication is wrongful, as where a member is expelled from the caste without opportunity of explanation being offered to him (g). In the Mufassal of Bombay, however, a suit does not lie in such a case for restoration to caste, the cognizance of such a suit being expressly barred by Bombay Regulation II of 1827, s. 21 (h); but a suit for damages will lie.

Suits in which the principal question relates to religious rites or ceremonies are not suits of a civil nature.—Thus a suit will not lie to establish a right to parade bullocks on certain days (i); or to compel pujaris to adorn an idol at certain seasons (j), or to install in a particular temple instead of in another (k). There is no right whatever of a civil nature that is involved in these cases.

Suits for vindication of a mere dignity attached to an office are not suits of a civil nature.—A claim by a Srami (such-priest) that he is entitled to be carried on the high road of a town or village in a palanquin on ceremonial occasions will not be entertained by a civil Court (l). What is claimed by the plaintiff in such a case is a mere mark of honour appended to the office of a Srami. Civil Courts should discourage as much as possible claims of so unsubstantial and objectionable a nature, and they ought not to be involved in the determination of trivial questions of dignity and privilege, although connected with an office. Following this rule the Courts have declined to decide disputes as to precedence or privilege between purely religious functionaries (m). But if honours be attached to an office by way of remuneration, in other words, as part of its emoluments, a civil Court can entertain a suit for such honours (n).

Suits for secular office.—When no remuneration attaches to the office of the Secretary of an Association (registered under Act 21 of 1860), a suit for a declaration that the plaintiff is the Secretary of the Association and that his dismissal from the office was not justified by the rules of the Association, is not maintainable by a civil Court, especially if the Association has powers to alter its rules from time to time. The reason is that in such a case no decree which any civil Court could pass in plaintiff's favour could prevent the Association from altering its rules and then disposing with the plaintiff's services and employing some one else (o).

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| <p>(e) <i>Raghunath v. Janardhan</i> (1891) 15 Bom. 599;
 <i>Sudharan v. Sudharan</i> (1869) 3 B. L. R. A.
 J. 91; <i>Atayushankar v. Harishankar</i> (1886)
 10 Bom. 661.
 (f) <i>Jagannath v. Akali</i> (1894) 21 Cal. 463.
 (g) <i>Appayya v. Padappa</i> (1899) 23 Bom. 122;
 <i>Keshaviah v. Bui Girja</i> (1900) 24 Bom.
 13, 22-23; <i>Pallabha v. Madusudan</i> (1889)
 12 Mad. 495; <i>Ganupati v. Bharati</i> (1894)
 17 Mad. 222.
 (h) <i>Noithu v. Keshurji</i> (1902) 26 Bom. 174.</p> | <p>(i) <i>Rama v. Shriram</i> (1882) 6 Bom. 116.
 (j) <i>Varadav v. Vannaji</i> (1881) 5 Bom. 80.
 (k) <i>Loke Nath v. Dasvathi</i> (1905) 32 Cal. 1072.
 (l) <i>Sri Sunkar v. Sidha</i> (1843) 3 M. I. A. 198 and
 <i>Shankara v. Hanna</i> (1878) 2 Bom. 474.
 (m) <i>Madhusudan v. Shankaracharya</i> (1909) 33
 Bom. 278.
 (n) <i>Rungachariar v. Rungasami</i> (1900) 32 Mad.
 291.
 (o) <i>Mukharaj Narain v. Shashi</i> (1915) 37 All. 313.</p> |
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Suits for religious office.—The *Explanation* to the section assumes that a suit in which the right to an "office" is contested is a suit of a civil nature. Now an office may be either secular or religious in its character. We are here principally concerned with an office of a religious character, for the question as to *religious* rites and ceremonies contemplated by the *Explanation* can only arise when the right to a *religious* office is contested. Religious offices may be divided into two classes :

I.—Those to which *fees* are appurtenant as of right ; such as the office of the *Kazi* of Bombay, or of the *Joshi* of a village. .

II.—Those to which no fees are attached, but which entitle the holder thereof to receive such *gratuities* as may be paid to him ; such as the office of *pujaris* or officiating priests in a temple, or of the *Aya* of a *math*.

As regards religious offices of the first class, that is, offices to which fees are attached, there is no doubt that a suit will lie against an intruder for a declaration that the office is vested in the plaintiff. Such a suit is a suit of a civil nature, and it will be tried by a civil Court (p).

* As regards religious offices of the second class, the question is, whether a suit will lie for an office to which no fees are attached ? Different views have been held on this point by different Courts. It has been held by the High Court of Calcutta that a suit by a person claiming to be entitled to a religious office against a usurper for a declaration of the plaintiff's right to the office is a suit of a civil nature, and will therefore be entertained by a civil Court, though no emoluments are attached to the office at all. This conclusion is arrived at by the simple reasoning that a religious office, though no fees are attached to it, is after all an "office" within the meaning of this section and that the section assumes that a suit for an "office" is a suit of a civil nature (q). On the other hand, it has been held by the High Court of Madras that a suit will not lie for a religious office to which no fees are attached (r). As regards Bombay decisions, we may divide them into two classes, namely, (1) those in which the religious office is attached to a temple, shrine, or sacred spot, and (2) those in which the office is entirely personal in its character. A suit will lie for a religious office which is attached to a place, though no fees are appurtenant to it, such as the office of officiating priest in a temple, or of *Aya* of a *math* (s). But a suit will not lie for an office to which no fees are attached, if the office be personal in its character, such as the office of *Chalwady* (t) (bearer on public occasions of the insignia of a caste), or the office of *Guru* (u). It has been held by the High Court of Allahabad that a mere right to perform *Ram Lila* (religious pageants), which does not carry with it any right to emoluments, nor is attached to a shrine or temple or sacred spot, cannot be enforced in a Court of law (v).

Suit for inspection of accounts of caste property.—Such a suit relates purely to a caste question, and it cannot therefore be entertained by a civil Court (w).

Interference with temple property.—Removal or alteration of namams or religious marks in a temple, which are recognized as the badges of a particular religious denomination, amounts to an interference with *property*, and is a ground of action in civil Courts (x).

(p) *Muhammad v. Sayad Ahmed* (1861) 1 B. H. C. App. xviii; *Ghelabhai v. Dargawan* (1911) 36 Bom. 94.
(q) *Dino Nath v. Pratap Chandra* (1900) 27 Cal. 30.
(r) *Tholappala v. Venkata* (1896) 19 Mad. 62; *Subbaramu v. Vedunathar* (1903) 28 Mad. 23.
(s) *Limba v. Rana* (1880) 13 Bom. 518; *Gursar-*

gaya v. Tamana (1892) 16 Bom. 281.
(t) *Shankara v. Hanna* (1878) 2 Bom. 471.
(u) *Murari v. Suba* (1882) 6 Bom. 725; *Gadigeya v. Basaya* (1910) 34 Bom. 455.
(v) *Chunnu Dutt v. Babu Nandan* (1910) 32 All. 527.
(w) *Jethabhai v. Chopsey* (1900) 34 Bom. 407.
(x) *Krishnasami v. Samaram* (1907) 30 Mad. 158.

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Suits expressly barred.—The section says that certain suits, though of a civil nature are not triable by civil Courts, if the cognizance of such suits is expressly barred, that is, by any enactment for the time being in force. Thus it is provided by the Income Tax Act, s. 39, that “no suit shall lie in any civil Court to set aside or modify any assessment made” under that Act.

Suits impliedly barred.—Besides suits of which the cognizance is expressly barred, there are suits which are barred by general principles of law, such as suits relating to acts of State and public policy. Thus a suit will not lie against the Secretary of State for damages for publication of a Government resolution in the Government Gazette respecting the conduct of a public servant, though it may amount to a libel. Such a publication is an act of State in respect of which no action lies (y). Similarly a suit will not lie for damages for defamatory statements made in the course of a judicial proceeding by a party or by a witness. The ground of this principle is, “that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of justice should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur, if they give evidence falsely, should be an indictment for perjury” (z).

10. No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in British India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of British India established or continued by the Governor-General in Council and having like jurisdiction, or before His Majesty in Council.

Stay of suit.

Explanation.—The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action.

Scope and object of the section.—The present section provides that where a suit is instituted in a Court to which the Code applies, the Court shall not proceed with the trial of the suit, if—

first, the matter in issue in the suit is also directly and substantially in issue in a previously instituted suit between the same parties;

secondly, the previously instituted suit is pending—

(a) in the same Court in which the subsequent suit is brought, or

(b) in any other Court in British India (whether superior, inferior or co-ordinate),
or

(y) *Jehanyir v. Secretary of State* (1903) 27 Bom. 189.
(z) *Chidambaram v. Thirumalai* (1887) 10 Mad. 87; *Nathji v. Lalbhai* (1890) 14 Bom. 97;

Templeton v. Laurie (1901) 25 Bom. 230;
Dowm Singh v. Mahip Singh (1897) 10 Ail. 425; *Bhikumber v. Becharam* (1888) 15 Cal. 264.

- (c) in any Court beyond the limits of British India established or continued by the Governor General in Council, or
 (d) before His Majesty in Council; and

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thirdly. where the previously instituted suit is pending in any of the Courts mentioned in cl. (b), or cl. (c), such Court is a Court of jurisdiction competent to grant the relief claimed in the subsequent suit.

The object of the section is to prevent Courts of concurrent jurisdiction from *simultaneously* trying two parallel suits in respect of the same matter in issue. *A* carries on business at Karachi. *A* has an agent *B* at Calcutta. *A* sues *B* in the Karachi Court for an account of dealings between them and for recovery of whatever sum should be found due on the taking of such account. Subsequently *B* sues *A* in the High Court of Calcutta for recovery of Rs. 26,000 or in the alternative for an account. Here the matter in issue in *B*'s suit is directly and substantially in issue in *A*'s suit; further, both the suits are between the same parties, and the Court at Karachi is a Court of jurisdiction competent to grant the relief claimed in *B*'s suit. Such being the case, the suit filed in the Calcutta Court should be stayed, and the suit in the Karachi Court, being the one instituted *prior in point of time*, should be proceeded with (a). But if *A* carried on business at Pondicherry instead of at Karachi, and the suit was brought by him in the Pondicherry Court, the Calcutta Court would not be precluded from proceeding with the trial of *B*'s suit, the Pondicherry Court being a "foreign" Court. See the *Explanation* to the section.

11. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Res Judicata.

Explanation I.—The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.—For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

(a) *Padamse v. Lakhmasee* (1910) 43 Cal 144.

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Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.—Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Res judicata.—The present section deals with the doctrine of *res judicata*. The leading case on the subject is the *Duchess of Kingston's case* (b). Contrasting the present section with s. 10, it may be said that the rule in s. 10 relates to *res sub judice*, that is, a matter which is pending judicial inquiry; while the rule in the present section relates to *res judicata*, that is, a matter adjudicated upon or a matter on which judgment has been pronounced. Section 10 bars the trial of a *suit* in which the matter directly and substantially in issue is *pending* adjudication in a previous suit. The present section bars the trial of a suit or an issue in which the matter directly and substantially in issue *has already been* adjudicated upon in a previous suit.

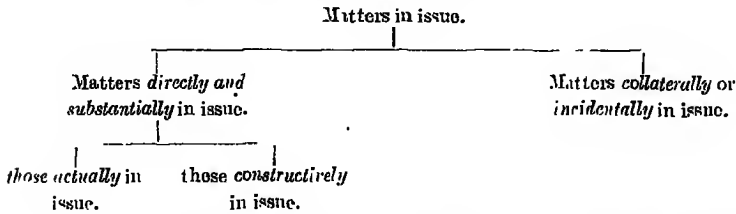
Conditions of res judicata.—It is not every matter decided in a former suit that can be pleaded as *res judicata* in a subsequent suit. To constitute a matter *res judicata* the following conditions must concur :

- I.—The matter directly and substantially in issue in the subsequent suit or issue must have been *directly and substantially in issue*, either actually (*Explanation III*) or constructively (*Explanation IV*) in the former suit.
- II.—The former suit must have been a suit between *the same parties or between parties under whom they or any of them claim*. *Explanation VI* is to be read with this Condition.
- III.—The parties as aforesaid must have *litigated under the same title* in the former suit.
- IV.—The Court which decided the former suit must have been a Court *competent to try the subsequent suit* or the suit in which such issue is subsequently raised. *Explanation II* is to be read with this Condition.
- V.—The matter directly and substantially in issue in the subsequent suit must have been *heard and finally decided* by the Court in the first suit. *Explanation V* is to be read with this Condition.

We proceed to consider the above Conditions in order.

(b) 2 Smith's L. C. 713.

Condition 1. Matter directly and substantially in issue.—The following table sets forth the several matters we have to consider under Condition I:— S. II.



It is not enough to constitute a matter *res judicata* that it was *in issue* in the former suit. It is further necessary that it must have been in issue *directly and substantially*. A matter cannot be said to have been “directly and substantially” in issue in a suit, unless it was alleged by one party and denied or admitted, either expressly or by necessary implication, by the other.

Explanation III.—It is not enough that the matter was *alleged* by one party (c). At the same time it is not necessary to constitute a matter “directly and substantially” in issue that a *distinct* issue should have been raised upon it; it is sufficient if the matter was in issue *in substance* (d). A, claiming as the adopted son of X, sues B to recover possession of certain property forming part of the estate of X. Here the question of adoption would not be a matter “directly and substantially” in issue, unless B either *admitted* or *denied* the adoption. For B might neither admit nor deny the adoption, and might resist A’s claim on the ground of adverse possession, or on the ground that he is entitled to the property as a devisee under the will of X. In that case, the question of adoption would not be a matter “directly and substantially” in issue.

Matter collaterally or incidentally in issue.—Every suit *must* involve a matter “directly and substantially” in issue. It *may* also involve a matter “collaterally or incidentally” in issue. To constitute a matter *res judicata*, it is necessary that it must be in issue “directly and substantially” in the suit under trial, and that it must have been in issue also “directly and substantially” in a former suit.

Illustrations.

(a) A, claiming to be the *chela* and heir of a deceased *mohunt*, sues B (a tenant) for the rent of certain lands forming part of the estate of the *mohunt*. C claims that he and not A, is the *chela* and heir of the deceased, and that he is therefore entitled to the rent. C is thereupon added as a defendant to the suit (see O. I, r. 10. Code of 1882, s. 32.) The issues raised are—

1. Whether A or C is the *chela* and heir of the *mohunt*?
2. Whether any and what rent is due by B?

The Court finds that A is the *chela* and heir of the *mohunt*. It also finds that there is a sum of Rs. 2,500 due by B for rent, and decrees A’s claim.

Subsequently C sues A for a declaration that he is the *chela* and heir of the *mohunt*, and claims that he is as such entitled to the *whole* of the property left by the *mohunt*.

(c) *Sheo Ratan v. Sheo Sahai* (1884) 6 All. 338, 362.

(d) *Soorjomonee v. Suddanund* (1874) 12 B. I. R. 301, 313, Sup. Vol. I. A. 213.

S. 11.

A contends that the question as to who is the *chela* and heir of the deceased is *res judicata*. The question is *res judicata*, and the suit ought to be dismissed, for though the former suit was for rent, the entire question of *title* to the property of the deceased was directly and substantially in issue in that suit and it was decided against *C*: *Toponidhee v. Sreeputty* (1880) 5 Cal. 832.

(b) *A*, a Hindu, dies leaving a widow and a brother, *C*. The widow sues *B* (a tenant) for the rent of certain property alleging that it was the *separate* property of her deceased husband. *C* claims to be entitled to the rent on the ground that it was the *joint* property of himself and his deceased brother, and that he became entitled to it by right of survivorship. *C* is thereupon added as a defendant to the suit. The issues are—

1. Whether *A* alone received the whole rent of the property in his lifetime, or whether the rent was received by him jointly with *C*?
2. Whether any and what rent is due by *B*?

The Court finds on the first issue that *A* alone received the whole rent in his lifetime. (The finding on the second issue is unnecessary for our present purposes.)

Subsequently *C* sues the widow for a declaration that he and his brother *A* were joint, and claims to be entitled to the said property by right of survivorship. The question whether *A* and *C* were joint or separate is not *res judicata*, for it was not "directly and substantially" in issue in the former suit. It was in issue in that suit only "collaterally or incidentally," for it will be seen on referring to the first issue in that suit that it did not cover the *entire* question of *C*'s *title*, but related merely to the joint or separate receipt of *rent*. It would have been different if the first issue had been—whether *A* and *C* were members of a joint Hindu family, and the finding on the issue had been that they were not joint: *Rvn Bahadur v. Luchu Koer* (1885) 11 Cal. 301. 12 I. A. 23; *Srihari v. Khitisk Chandra* (1897) 24 Cal. 569.

It is the matter directly and substantially in issue in a suit, and not the subject-matter thereof, that forms the test of res judicata.—Hence it follows that though the *subject-matter* of the second suit may be entirely different from the *subject-matter* of the first, yet if a matter which is directly and substantially in issue in the subsequent suit was also directly and substantially in issue in the previous suit, the decision on the matter so in issue in the previous suit will operate as *res judicata* so as to bar the trial of that matter in the subsequent suit. Thus if *A* claims certain property as the adopted son of *X*, and the defendant denies the adoption, and the Court finds that *A* is the adopted son of *X*, this will be binding on the defendant as *res judicata* in a subsequent suit by *A* against the same defendant to recover *another property* claimed under the *same title* (e). It is not open to the defendant to contend that the properties claimed in the two suits being different, the decision on the question of *A*'s adoption in the first suit cannot operate as *res judicata* in the second.

Former suit: Explanation I.—We have said above that a decision in a *former* suit may operate as *res judicata* in a subsequent suit. What is the meaning of "*former* suit"? Does it refer to the suit that has been first *instituted* or to the suit that has

(e) *Pillapur Raja v. Buchi* (1885) 8 Mad. 219, 12 I. A. 16; *Krishn v. Bannari Lall* (1870) 1 Cal. 144 2 I. A. 28; *Radha Prasad v. Lal*

Sahab (1881) 13 All. 53, 02, 17 I. A. 150; *Dwarkan Das v. Akhay Singh* (1908) 30 All. 470.

been first *decided*? The answer is that it refers to the suit that has been first *decided*; in other words, "former suit" means a previously *decided* suit. The result, therefore, is that if suit No. 2 is instituted after the date of the institution of suit No. 1, and suit No. 2 is decided first, the decision in suit No. 2 may operate as *res judicata* in suit No. 1 (f). The same rule applies to appeals (g). Explanation I, which is new, does no more than give effect to these decisions.

S. 11.

Matter which might and ought to have been made ground of attack or defence: Explanation IV.—A matter directly and substantially in issue may be either "actually" in issue or it may be in issue "constructively." In the case of the *chela* and *Mokunt* cited above, where it was held that the matter was in issue directly and substantially, the matter was "actually" in issue directly and substantially, for it was *actually* alleged by one party and denied by the other. It often happens that a matter which *might and ought* to have been made ground of attack by the plaintiff to substantiate the relief claimed by him in the suit, is not alleged by him as a ground of attack; and also that a matter which *might and ought* to have been made ground of defence by the defendant is not set up as a ground of defence. A matter, which *might and ought* to have been made ground of attack or defence in the former suit, but which has not been alleged as a ground of attack or defence, will be deemed to have been a matter directly and substantially in issue in such suit (*Explanation IV*). That is to say, though it has not been *actually* in issue directly and substantially, it will be regarded as having been *constructively* in issue directly and substantially. This section draws no distinction between the claim that *was actually* made in a suit, and the claim that *might and ought* to have been made.

Illustrations.

1. X, a Hindu, dies leaving a widow. The widow makes a gift of certain property belonging to her husband to her brother, B. After the death of the widow, A, alleging that he and X were members of a joint family, sues B for a declaration that he is entitled to the property by right of *survivorship*. The Court finds that A and X were separate, and A's suit is dismissed. Subsequently A sues B for the recovery of the same property, alleging that as the nearest reversionary heir of X, he became entitled to the property on the death of the widow, and that the alienation made by her in favour of B was not binding upon him. The suit is barred as *res judicata*. A *might and ought* to have set up the title by *heirship* as a ground of attack in the former suit. It will therefore be deemed to have been "directly and substantially in issue" in that suit, and it will also be deemed to have been "heard and finally decided" against A: *Guddapa v. Tirappa* (1901) 25 Bom. 189, dissented from in *Ramaswami v. Vythinaltha* (1903) 26 Mad. 760, a case on different facts altogether. The grounds of dissent, it is submitted, are not satisfactory.

2. A, a Hindu, dies leaving a widow and a brother B. The widow sues B for recovery of certain property, alleging that it was the self-acquired property of her husband, and that a will alleged to have been executed by her husband and relied on by B was a forgery. B alleges that the property was joint family property, and that on the death of A he became entitled thereto by right of *survivorship*, but he does not claim any title to the property under the will. The Court finds that the property was the self-acquired property of A, and decrees the widow's claim. Subsequently B sues the widow to recover the same property from her, now claiming the same as a *devisee* under A's will.

(f) *Ujjainmah v. Veekabakrishnama* (1901),
2 Mad. 350; *Balkishan v. Kishan Lal*
(1899) 11 All. 148.

(g) *Ram Lal v. Chhab Nath* (1899) 12 All.
578; *Beni Madho v. Indar Sahai* (1900)
32 All. 67.

7. II.

The suit is barred as *res judicata*. *B* might and ought to have set up the claim *under the will* as a ground of defence in the former suit. "When a plaintiff claims an estate, and defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him according to his knowledge then to bring forward": *Srimut Rajah v. Katana Natchiar* (1866) 11 M.I.A. 50; *Doorga Persad v. Doorga Konwari* (1879) 4 Cal. 190, 5 I. A. 149.

3. *A* lends Rs. 50,000 to a Hindu widow on a mortgage of her husband's property. The widow then surrenders the property to *D*, the reversionary heir of her husband, on *B* agreeing to pay all her debts. *A* sues *B* and the widow to recover Rs. 50,000 by sale of the mortgaged property. *A* also asks for a personal decree against the widow, but he does not ask for a personal decree against *B*. *B* is joined as a defendant on the ground that the mortgaged property formed part of the property transferred by the widow to him. The Court finds that the mortgage is not binding upon the husband's estate, and the suit against *B* is accordingly dismissed. As against the widow, a personal decree is made for the amount of the loan. *A* realises Rs. 5,000 only from the widow, and after her death, he sues *B* for the balance of the money due under the decree (that is to say, *A* asks for a personal decree against *B* for the balance) alleging that *B* was personally liable under the agreement with the widow to pay her debts. The suit is barred as *res judicata*, for *A* "might and ought" to have alleged in the former suit that if the mortgage was not binding on the estate, *B* was at all events personally liable to pay the debt in consequence of the agreement which he (*B*) had entered into with the widow: *Kameswar Pershad v. Rajkumari* (1893) 20 Cal. 79, 19 I. A. 234.

It is clear that it cannot be said of any matter that it *ought* to have been set up as a ground of attack in a former suit, if its introduction would have been *incongruous* to the matter of that suit (*h*).

Issue of law.—Issues are of three kinds: (1) issues of fact, (2) issues of law, and (3) mixed issues of law and fact.

An issue of fact may be *res judicata*. Almost all the cases we have hitherto dealt with relate to issues of fact. Note the words with which the section begins "no Court shall try any suit or issue."

An issue of mixed law and fact stands on the same footing as an issue of fact, and it may also be *res judicata* (*i*).

An issue of law may or may not be *res judicata*. It may be *res judicata*, if the cause of action in the subsequent suit is the same as that in the former suit (*j*). But it cannot be *res judicata* if the cause of action in the subsequent suit is different from that in the former suit (*k*). Cases falling under the latter class are cases of recurring liability, such as rent, maintenance, etc.

Conditions II: Parties.—*A* sues *B* for rent. The defence is that *C*, and not *A* is the landlord. *A* fails to prove his title, and the suit is dismissed. *A* then sues *B* and

(h) *Deputy Commissioner of Kheri v. Khanna Singh* (1907) 29 All. 331, 34 I. A. 72.

(i) *Bishnu Priya v. Bibha Sundari* (1901) 28 Cal. 318; *Koyyandu v. Doosy* (1908) 20 Mad. 225.

(j) *Gonri Koer v. Anbh Koer* (1884) 10 Cal. 1087; *Phundoo v. Jangli Nath* (1893) 15 All. 527; *Kaveri Annamall v. Sastri Ramier* (1903) 26

Mad. 104; *Waman v. Hari* (1907) 31 Bom. 128.

(k) *Alimuddin v. Shama Charan* (1905) 32 Cal. 740; *Baij Nath v. Padmanand* (1912) 39 Cal. 848; *Vishnu v. Ramling* (1902) 26 Bom. 25; *Kuppasa v. Kumara* (1909) 14 Mad. 550.

C for a declaration of his title to the property. The suit is not barred, for the parties to the two suits are not the same: C not being a party to the former suit (l). S. 11.

Res judicata as between co-defendants.—As a matter may be *res judicata* between a plaintiff and a defendant, so it may be *res judicata* as between co-plaintiffs and co-defendants.

First, as to *res judicata* between co-defendants: if in a suit by A against B and C as defendants, there is a matter directly and substantially in issue between B and C, and an adjudication is made upon that matter, and such adjudication was necessary to the determination of the suit, the adjudication may operate as *res judicata* in a subsequent suit between B and C in which either of them is plaintiff and the other defendant (m). A Hindu, H, dies leaving two daughters D1 and D2, and a nephew N. D1 sues D2 and N to recover certain property under an oral will of H. D2 claims the property under a will in writing executed by H. N claims the property as undivided nephew of H. The Court finds that H and N were divided, that the written will is the valid will, and dismisses D1's suit. Subsequently D2 sues N to recover the property under the written will. N contends that he and H were joint, and that on H's death he became entitled to the property by right of survivorship. The question whether H and N were joint is *res judicata*. That question was directly and substantially in issue in the first suit, and it was necessary to decide it in that suit to adjudicate upon D1's claim, and it was decided against N (n).

Res judicata as between co-plaintiffs.—Next, as to *res judicata* between co-plaintiffs. As a matter may be *res judicata* between co-defendants, so it may be *res judicata* between co-plaintiffs, subject to the same conditions that obtain in the case of co-defendants (o).

Explanation VI.—This explanation provides that where persons litigate *bonâ fide* in respect of a public right or a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to "claim under" the person so litigating. It refers to cases in which a decision in a suit may operate as *res judicata* against persons not expressly named as parties to the suit, as where a suit is instituted by A and B on behalf of themselves and others, or where it is instituted against A and B on behalf of themselves and others. The conditions under which the decision in such a suit may constitute *res judicata* against the parties not expressly named in the suit are—

1. That there must be a right claimed by A and B in common for themselves and the parties not expressly named in the suit (p), and
2. That the parties not expressly named in the suit must be interested in such right.

Illustrations.

(1) A decree in a suit against certain members of a sect alleged to be wrong-doers in their individual capacity cannot operate as *res judicata* in a subsequent suit against

(l) *Dwarkanath v. Rani Chand* (1899) 26 Cal. 428, 432.

(m) *Chajju v. Umrao* (1900) 22 All. 386; *Balambhat v. Narayanbhat* (1901) 25 Bom. 76; *Yusuf v. Durji* (1907) 30 Mad. 447; *Gurdeo Singh v. Chandrikah Singh* (1909) 36 Cal. 193; *Fakirchand v. Nagindchand* (1910) 40 Bom. 210.

(n) *Venkayya v. Narasamma* (1888) 11 Mad. 204.

(o) *Krishnan v. Kannan* (1898) 21 Mad. 8; *Rukhmini v. Dhondo* (1911) 36 Bom. 207; *Chhiddu v. Durga* (1900) 22 All. 382; *Asghar v. Mahomed* (1903) 30 Cal. 556.

(p) *Somasundara v. Kulandavelu* (1905) 28 Mad. 457 (F. B.); *Surender Nath v. Brojo Nath* (1886) 13 Cal. 352; *Jaimangal Deo v. Bed Saran* (1911) 33 All. 493.

- S. 11. the other members of the sect: *Sadagopa Chariar v. Krishnamoorthy Rao* (1907) 30 Mad. 185, 34 I.A. 93. [The wrong complained of in the former suit in this case was that the defendants carried an idol in procession through certain streets, and that such processions were in violation of the plaintiffs' rights. The suit was against the defendants in their individual capacity, and not as representing the sect to which they belonged.]

(2) *A and B as members of the Mahomedan community* bring a suit against *C* for a declaration that a certain mosque and a garden appertaining to the mosque are wakf (charitable) property. The plaintiffs fail to prove that the properties are wakf property, and the suit is dismissed. After some years a suit is brought by nine other members of the same community against the same defendants for the same relief. The suit is barred as *res judicata*. The reason is that the first suit by *A* and *B* was brought by them in their representative capacity, that is, as representing the whole Mahomedan community of the place [see notes to O. I. r. 8]: *Muhammad v. Sumitra* (1914) 36 All. 424.

Condition III: Litigating under the same title.—The third condition of *res judicata* is that the parties in the subsequent suit must have litigated under the "same title" in the previously decided suit. The expression "same title" means the same capacity. "A verdict against a man suing in one capacity will not stop him when he sues in another distinct capacity, and, in fact, is a different person in law" (7). Thus, where a suit is brought by a person to recover possession from a trespasser of *math* property claiming it as the *heir* of a deceased *mohant*, but he does not produce any certificate of succession to establish his *heirship*, and the suit is thereupon dismissed, the dismissal is no bar to a suit by him *as manager of the math and on behalf of the math* (7). Similarly the dismissal of a suit brought by a son against his father for maintenance claimed *under an agreement* is no bar to a suit by him against the father for a declaration that he is entitled to maintenance out of certain lands in the hands of the father *held under a sanad* from Government whereby, it was alleged, the lands were charged at the time of grant with the maintenance of the junior members of the family (8).

Condition IV: Competence of Court.—In order that a decision in a former suit may operate as *res judicata* in a subsequent suit, it is necessary that the Court which tried the former suit must have been a Court competent to try the subsequent suit.

In determining whether the Court which decided the former suit was competent to try the subsequent suit, the following points should be noted :—

- (1) *The Court which decided the former suit must have been a Court competent to try the subsequent suit as regards the "amount" of the subsequent suit.*—In other words, the jurisdiction of the Court which decided the former suit, and that of the Court in which the subsequent suit is brought, must be concurrent as regards their *pecuniary limit*. *A* sues *B* in Court *X* to recover interest due on a bond for Rs. 12,000. For the defence it is alleged that the amount actually lent by *A* was Rs. 4,000, that *B* being in want of money passed the bond for Rs. 12,000 and that *A* therefore was not entitled to interest on more than Rs. 4,000. The Court finds that the amount actually lent was Rs. 4,000, and awards *A* interest on that amount. Court *X* is a Court of which the jurisdiction is limited to suits of which the value does not exceed Rs. 5,000. *A* then sues *B* in a High Court—and a High Court is a Court having no limit to its pecuniary jurisdiction—to recover the principal sum of Rs. 12,000, alleging that that was the actual amount lent by him to *B*: *B* contends

(q) *Duchess of Kingston's case*, 2 Smith's L. C. 713, 740.
(r) *Babajirao v. Lazmandas* (1904) 28 Bom. 215;
Distingish Hargovan v. Mugi (1909) 34

Bom. 416.
(s) *Ahmad v. Nihal-ud-Din* (1883) 9 Cal. 945, 10 I. A. 45.

that the actual amount advanced was Rs. 4,000, and that the question as to whether Rs. 12,000 was lent or Rs. 4,000 is *res judicata* and that it cannot be tried over again. The question is not *res judicata*, for the jurisdiction of Court X being limited to Rs. 5,000, it was not a Court competent to try the subsequent suit in which the amount claimed is Rs. 12,000 (t). S. 11.

(2) *The jurisdiction of the two Courts must be concurrent not only as regards the "pecuniary" limit, but also as regards the "subject-matter" of the subsequent suit.*—Thus certain Courts have no jurisdiction to adjudicate upon questions of title, though that question may be gone into incidentally to decide the principal question. A finding on a question of title by such Court cannot operate as *res judicata*. This generally happens in the following cases:—

(a) *Where the first Court is a "Probate Court" and the second Court a "Civil Court."*—A and B, each claiming to be the heir of X, apply to a High Court, in the exercise of its *testamentary jurisdiction*, for letters of administration of the estate of X. The Court finds that A is the heir of X, and grants letters to him. B then sues A in the same Court in the exercise of its *original jurisdiction* for a declaration that he, and not A, is the heir of X. The suit is not barred, for a Probate Court has no jurisdiction to finally adjudicate upon questions of title (u). It must not, however, be supposed that a decision of a Probate Court cannot operate as *res judicata* in any subsequent proceeding in a Civil Court. Thus if A, alleging to be the executor of B's will, applies for probate of the will, and C, B's widow, opposes the application, and probate is refused on the ground that the will is not proved, A will be precluded, in a subsequent suit by B against him, to recover her husband's property from him, from contending that he is the husband's executor and is entitled as such to retain possession of the property. Though the judgment of the Probate Court refusing probate to A does not operate in such a case as a judgment *in rem*, it operates as *res judicata* between A and C under s. 83 of the Probate and Administration Act (V of 1881) and s. 11 of the Code (v). See Evidence Act, 1872, s. 41.

(b) *Where the first Court is a "Munsif's Court" and the second Court a "District Court."*—A sues B for rent in a Munsif's Court. The defence is that C, and not A, is the landlord. The Court finds that A is not the landlord, and the suit is dismissed. A then sues B in a District Court for a declaration of title to the land. The suit is not barred, for a Munsif's Court has no jurisdiction to adjudicate upon questions of title (w).

(c) *Where the first Court is a "Criminal Court" and the second Court is a "Civil Court."*—An order by a Magistrate under s. 146 of the Criminal Procedure Code, 1898, declaring a party to be entitled to possession of certain lands, is conclusive on the point of *actual possession* in a subsequent proceeding in a Civil Court (x). But a conviction or an acquittal in a criminal case is not conclusive in a civil suit for damages in respect of the act charged against the accused (y). The finding, therefore, of a Criminal Court that A had assaulted or abducted B, is not *res judicata* in a suit for damages against A for assault or abduction (z).

(t) *Misir v. Sheo Baksh* (1883) 9 Cal. 439, 9 I. A. 197. (u) *Ran Bahadur v. Lachoo Koer* (1885) 11 Cal. 301, 12 I. A. 23.
(v) *Arunmoyi v. Mohendra Nath* (1893) 20 Cal. 888; *Chintaman v. Ramchandra* (1910) 34 Cal. 389. (x) *Lilla v. Annaji* (1881) 5 Bom. 387.
(w) *Bishonath v. Huro* (1896) 5 W. R. 27; *Doorga v. Doorga* (1896) 6 W. R. Civ. Ref. 26. (y) *Ali Baksh v. Sheikh* (1890) 12 W. R. 477; *Ram Lal v. Tula Ram* (1892) 4 All. 97, See Evidence Act, s. 43.
(z) *Kalyanchand v. Sitabai* (1913) 38 Bom. 309. See *Sheoparsan v. Ramnandan* (1916) 43 Cal. 694, 705, 43 I. A. 91, 98.

S. 11.

Explanation II.—This Explanation is new. Under the Code of 1882, it was held by the High Courts of Bombay (a) and Madras (b), that a decision in a suit in which no second appeal was allowed by law could not operate as *res judicata* in a subsequent suit in which such appeal was allowed. Hence it was held that a decision in a suit of the nature cognizable in Provincial Courts of Small Causes could not operate as *res judicata* where the amount or value of the subject-matter of the suit did not exceed Rs. 500, as no second appeal could lie in such suit (see s. 102). On the other hand, it was held by the High Court of Calcutta that a decision in a suit could operate as *res judicata*, notwithstanding that no second appeal was allowed by law in that suit (c). **Explanation II** is intended to affirm the view taken by the High Court of Calcutta that the competence of the jurisdiction of a Court does not depend on the right of appeal from its decision.

Condition V: Heard and finally decided.—The mere fact that a matter directly and substantially in issue in a suit was directly and substantially in issue in a former suit is not sufficient to constitute the matter *res judicata*. It is further necessary that the matter must have been “heard and finally decided” in the former suit. This does not mean that there should be an *actual* finding on the issue in question; it is enough if the decree necessarily involves a finding of the issue (d). In this connection it is important to note that neither an *obiter dictum* nor a mere expression of opinion in a judgment has the effect of *res judicata* (e).

A matter will be said to have been “heard and finally decided,” notwithstanding that the former suit was disposed of—

- (i) *ex-parte* (f) : or
- (ii) by dismissal under O. 17, r. 3 (g) : or
- (iii) by a decree on an award (h) : or
- (iv) by oath tendered under s. 8 of the Indian Oaths Act, 1873 (i).

If the plaintiff fails to adduce evidence at the hearing, and the suit is dismissed, it is none the less “heard and finally decided” (j). And a suit will be said to have been “heard and finally decided,” though it may have been dismissed as barred by limitation.

The decision in the former suit must have been one on the merits.—In order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been one on the merits. Hence it could not be said of a matter that it was “heard and finally decided,” if the former suit was dismissed—

- (i) for want of jurisdiction (k) : or
- (ii) for default of plaintiff's appearance under O. 9, r. 8 (l) : or

(a) *Govind v. Dhondharav* (1891) 15 Bom. 104.
 (b) *Avanasi v. Nachunnai* (1906) 29 Mad. 195.
 (c) *Rai charan Ghose v. Kuned Mahun* (1898) 25 Cal. 571; *Bhugwanbhatti v. Forbes* (1901) 28 Cal. 78.
 (d) *Soorjomones Dayee v. Suddanund* (1874) 12 B. L. R. 304, I. A., Sup. Vol. 212; *Ramkrishna v. Vithal* (1891) 15 Bom. 89.
 (e) *Avala v. Kuppu* (1885) 8 Mad. 77; *Mohan v. Ram Dial* (1880) 2 All. 543.
 (f) *Mohamedun v. Brac* (1889) 16 Cal. 309.
 (g) *Venkatasubram v. Mahalakshminamma* (1887)

10 Mad. 272; *Shaik Sahab v. Mahomed* (1890) 13 Mad. 610.
 (h) *Gyunkatesh v. Saktharam* (1897) 21 Bom. 405.
 (i) *Ahmed v. Moidin* (1901) 24 Mad. 444.
 (j) *Walson v. Collector of Rajshahye* (1869) 1: M. I. A. 180; *Kartick v. Sridhar* (1890) 12 Cal. 503.
 (k) *Lakshman v. Ramchandarra* (1881) 5 Bom. 48, 7 I. A. 18; *Putali v. Tulja* (1879) 3 Bom. 223.
 (l) *Chand Kour v. Partab Singh* (1889) 16 Cal. 95, 15 I. A. 156; *Ramchandarra v. Narsinhacharya* (1900) 24 Bom. 251.

(iii) for want of necessary parties (*m*), or for misjoinder of parties (*n*), or for multifariousness (*o*); or

(iv) for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree (*p*); or

(v) for failure to furnish security for costs under O. 25, r. 2 (*q*); or

(vi) for failure to pay additional court-fees on a plaint which was undervalued (*r*).

The decision in the former suit must have been necessary to the determination of that suit.—A matter directly and substantially in issue cannot be said to have been “heard and finally decided,” unless the finding on the issue was *necessary to the determination of the suit*. A finding on an issue could be said to be necessary to the decision of a suit, if the decision was based upon that finding. And a decision could be said to have been based upon a finding if an appeal could lie against that finding, but not otherwise. The reason is that “everything that should have the authority of *res judicata* is, and ought to be, subject to appeal, and reciprocally an appeal is not admissible on any point not having the authority of *res judicata*” (*s*). This leads to the following rules:—

RULE I.—If the plaintiff’s suit is wholly dismissed, no issue decided against the defendant can operate as *res judicata* against him in a subsequent suit, for the defendant cannot appeal from a finding on any such issue, the decree being wholly in his favour (*t*) [see ill. (1)]; but every issue decided against the plaintiff may operate as *res judicata* against him in a subsequent suit, for the plaintiff can appeal from a finding on such issue, the decree being against him (*u*) [see ill. (2)]. A doubt has been expressed as to whether the second branch of this rule applies to cases where the Court after disposing of the suit against the plaintiff on a preliminary point proceeds to record its findings against the plaintiff on other issues, and it has been said that in such cases the findings on the other issues do not operate as *res judicata* against the plaintiff in a subsequent suit (*v*).

Illustration.

In a suit by *A* against *B* for ejectment, *B* contends (1) that no notice to quit was given, and (2) that the land being *majhes* land, he is not liable to be evicted at all. The suit is dismissed on a finding that no notice to quit was given, but the Court also finds that the land is not *majhes* land. *A* then sues *B* to evict him from the land after giving notice to *B*. *B* contends that the land is *majhes* land, and that he is not liable to be evicted. Does the finding in the first suit that the land was not *majhes* land operate as *res judicata* so as to preclude *B* from raising the same contention in the subsequent suit? No, for *A*’s suit having been dismissed, *B* could not have appealed from the finding that the land was not *majhes* land. The Court having found in the first suit that *A* had not given notice to quit, it was not necessary to the determination of the suit whether the land was *majhes* land or not. The decree against *A* in the first suit was not based

(m) *Sheosagar v. Sitaram* (1897) 24 Cal. 616, 24 I. A. 50.

(n) *Muhammad v. Nabian* (1886) 8 All. 282.

(o) *Fateh Singh v. Lachmi* (1871) 13 B. L. R. App. 37.

(p) *Pethapurnam v. Narugundi* (1895) 18 Mad. 406.

(q) *Hariram v. Lalbai* (1842) 26 Bom. 637.

(r) *Irawa v. Sanyappa* (1910) 35 Bom. 38.

(s) *Sup. Syst.*, s. 295.

(t) *Ran Lakhadur v. Luchio Koor* (1885) 11 Cal. 361, 306, 12 I. A. 23, 34; *Ghela v. Santalohana* (1894) 18 Bom. 597, 602; *Shib Charan v. Raghu* (1895) 17 All. 174; *Thakur Magundeo v. Thakur Mahadeo* (1891) 18 Cal. 647; *Parbati v. Mathura* (1912) 40 Cal. 29.

(u) *Prary v. Ambica* (1897) 24 Cal. 900.

(v) *Shib Charan v. Raghu* (1895) 17 All. 171, 195.

- S. II. upon the finding that the land was not *majhes* land; on the other hand, it was made in spite of that finding: *Thakur Magundeo v. Thakur Mahadeo* (1891) 18 Cal. 647; *Nundo v. Bidhoo* (1886) 13 Cal. 17. According to a recent Bombay case, if the finding that the land was not *majhes* land had been embodied in the decree, it would have constituted *res judicata* (v). With great respect, it is submitted, that that decision is erroneous.

Suppose that in the case put above, *B* had not raised the defence that the land was *majhes* land in the first suit. Would he be precluded from raising that defence in the second suit on the ground that he *might and ought* to have raised that defence in the first suit? No; the reason being that when a point of defence that has been actually raised and disallowed cannot operate as *res judicata* against a defendant, it certainly cannot operate as such when it has not been raised in fact, though it *might and ought* to have been raised (x).

RULE II.—If the plaintiff's suit is decreed in its entirety, no issue decided against the plaintiff can be *res judicata*, for the plaintiff cannot appeal from a finding on any such issue, the decree being wholly in his favour; but every issue decided against the defendant is *res judicata*, for the defendant can appeal from a finding on such issue, the decree being against him.

Illustration.

A, alleging that he is the adopted son of *X*, sues *B* to recover certain property granted to him by *X* under a deed and forming part of the estate of *X*. The Court finds that *A* is not the adopted son of *X*, but that he is entitled to the property under the deed, and a decree is passed for *A*. The finding that *A* is not the adopted son of *X* will not operate as *res judicata* in a subsequent suit between *A* and *B* in which the question of adoption is again put in issue; for the decree being in favour of *A*, *A* could not have appealed from that finding. The Court having found that *A* was entitled to the property under the deed, the finding on the question of adoption was not necessary to the determination of the suit. The decree, far from being based on the finding as to adoption, was made "in spite of it": *Rango v. Mudiayappa* (1899) 23 Bom. 296.

Consent-decree and estoppel.—The present section does not apply in terms to consent decrees; for it cannot be said in the case of such decrees that the matters in issue between the parties have been "heard and finally decided" within the meaning of this section (y). A consent decree, however, raises an estoppel as much as a decree passed *in invitum* (z). So long, therefore, as a consent decree stands, it is not open to either party thereto to give the go-bye to it, even if it contains clauses that are bad in law (a). A consent decree, however, is a mere enurement of the agreement on which it is founded, and may be set aside on any ground which would invalidate an agreement between the parties (b).

Explanation V: Relief claimed but not expressly granted.—If a relief is claimed in a suit, but it is not expressly granted in the decree, it will be deemed to have been refused, and the matter in respect of which the relief is claimed will be *res judicata*. Thus where

(w) *Mota v. Vitthal* (1916) 40 Bom. 662.
 (x) *Abdullakhan v. Khanmia* (1908) 32 Bom. 315.
 (y) *Minatal v. Kharsetji* (1908) 30 Bom. 305, 408.
 (z) *Nicholas v. Asphur* (1897) 24 Cal. 216, 237;
Lakshminishankar v. Vishnuram (1900) 24
 Bom. 77; *Bhaishankar v. Morarji* (1911) 35
 Bom. 283; *Raju Kumara v. Thatha* (1911)

35 Mad. 75; *In re American and Mexican
 Co.* [1895] 1 Ch. 37.
 (a) *Cowasji v. Kisanadas* (1911) 35 Bom. 371.
 (b) *Huddersfield Banking Co. v. Henry Lister and
 Son* [1895] 2 Ch. 273; *Great North-West
 Central Railway v. Charlebois* [1899] A. C.
 114.

in a suit by a mortgagee against his mortgagor (1) for a money-decree, and, in default of payment (2) for sale of the mortgaged property, the mortgagee was content to take a money-decree only, it was held that a subsequent suit by him, on failure of the mortgagor to satisfy the decree, to have the amount of the mortgage-debt paid to him by the sale of the property, was barred as *res judicata*. The relief as to sale having been claimed by the mortgagee, but not having been expressly granted in the former suit, must be deemed to have been refused so as to bar the subsequent suit (c). It is different, however, where there is no relief claimed for sale in the former suit (d). See O. 2, r. 2.

Ss.
11, 12.

Orders in execution proceedings and interlocutory orders.—A applies for execution of a decree obtained by him against B. The application is rejected on the ground that it is time-barred. A then makes a fresh application for execution of the same decree. The rejection of the first application is a bar to the trial of the second (e), not under s. 11 of the Code, for the former application is not a "former suit" within the meaning of that section, but upon general principles of law. These principles are analogous to the principles of *res judicata* (f).

Applications for amendment of decree.—Though an application for amendment of a decree is not a "suit" within the meaning of this section, yet if such an application is heard and finally decided, it will debar a subsequent application for the same purposes upon general principles of law analogous to those of *res judicata* (g).

Applications for review.—Where an application is made for a review of judgment, and the application is refused, it does not operate as *res judicata* so as to bar a subsequent suit for the same relief and on the same grounds as those put forward in the application for review. Neither s. 11 nor any doctrine of constructive *res judicata* can rightly be applied to such a case (h).

12. Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.

Bar to further suit.

Rules precluding institution of a further suit in respect of the same cause of action.—This section is new and is necessitated by the transfer of certain of the provisions of the Code of 1882 to Rules. The following is a list of the Rules that bar a fresh suit in respect of the same cause of action:—

- O. 2, r. 2 [Code of 1882, s. 43]—Omission to sue in respect of part of a claim is a bar to a further suit in respect thereof;
- O. 9, r. 9 [Code of 1882, s. 103]—Decree against plaintiff by default is a bar to a fresh suit;
- O. 22, r. 9 [Code of 1882, s. 371]—Abatement of suit is a bar to a fresh suit;

(c) *Shiba v. Chandara Mahan* (1906) 33 Cal. 849;
(d) *Piari Lal v. Nand Ram* (1900) 31 All. 19.

(e) *Bhala Nath v. Muhammad Sadiq* (1900) 31 All. 223.

(f) *Manjunath v. Venkatesh* (1882) 6 Bom. 54;
Bundey v. Ramesh (1883) 9 Cal. 65.

(g) *Ram Kirpal v. Rup Kaur* (1884) 6 All. 269,

111 I. A. 37; *Mungul Pershad v. Girja Kent* (1882) 8 Cal. 51, 8 I. A. 123; *Beni Ram v. Nanhu Mal* (1885) 7 All. 702, 11 I. A. 181.

(h) *Langat Singh v. Janki Kaur* (1911) 39 Cal. 265.
Srinchandra v. Triguna (1913) 40 Cal. 541.

Ss.
12, 13.

O. 23, r. 1 [Code of 1882, s. 373]—Withdrawal of suit without leave of Court is a *bar* to fresh suit.

X 13. A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—

When foreign judgment
not conclusive.

- (a) where it has not been pronounced by a Court of competent jurisdiction :
- (b) where it has not been given on the merits of the case ;
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of British India in cases in which such law is applicable :
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice :
- (e) where it has been obtained by fraud ;
- (f) where it sustains a claim founded on a breach of any law in force in British India.

Scope of the section.—The expression “foreign judgment” is defined in s. 2 as meaning the judgment of a foreign Court, that is, a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor-General in Council. The present section provides that a foreign judgment may operate as *res judicata* except in the six cases specified in the section.

How a foreign judgment may be enforced in British India.—A judgment of a Court of British India can only be enforced by proceedings in execution. A foreign judgment, however, may be enforced by *proceedings in execution* in certain specified cases only (s. 44). In other cases, a foreign judgment can only be enforced by a *suit* upon the judgment. That is to say, if *A* has obtained a decree against *B* for Rs. 5,000 in the French Court at Pondicherry, and if *B* has got no property at Pondicherry to satisfy the decree, but has got property in Bombay, *A* may *sue B* in the Bombay High Court to recover the amount of the judgment, provided the Bombay High Court has jurisdiction to entertain the suit. The suit must be brought within six years from the date of the judgment (*i*), and if a decree is made in favour of *A*, he may proceed to execute the same by attachment and sale of *B*'s property in Bombay.

Operation of the section.—The operation of the section may be illustrated by the following cases :— S. 13.

(a) *A* sues *B* in a foreign Court. If the suit is dismissed, the decision will operate as a bar to a fresh suit by *A* in British India on the original cause of action, *unless* the decision is inoperative on one or more of the grounds specified in the section (j). If a decree is made in favour of *A* in the foreign Court, and *A* sues *B* on the judgment in British India, *B* will be precluded from putting in issue the same matters that were directly and substantially in issue in the suit in the foreign Court, *unless* the decision of the foreign Court is inoperative on one or more of the grounds specified in the section.

(b) *A* obtains a decree against *B* in the Cochin Court, and applies for execution of the decree in the High Court of Bombay. (Decree of the Cochin Court may be executed in British India under s. 44). It is proved by *B* that the decree at Cochin was obtained by *A* by fraud (see cl. (c) of the section). The Bombay Court may refuse execution (k).

A British Indian Court will not give effect to a foreign judgment where it is pronounced by a Court without jurisdiction.—The leading case on the subject is *Gurdyl v. Raja of Faridkot* (l). In that case *A* sued *B* in the Court of the Native State of Faridkot, claiming Rs. 60,000, being the amount alleged to have been misappropriated by *B* while in *A*'s service at Faridkot. *B* did not appear at the hearing, and a decree *ex parte* was passed against him. *B* was a native of another Native State, Mhind. In 1869 he left Mhind, and went to Faridkot to take up service under *A*. In 1874 he left *A*'s service, and returned to Mhind. The suit was brought against him in 1879. *At the date of the suit, B neither resided in Faridkot nor was he a domiciled subject of the Faridkot State, nor did he owe allegiance to that State.* Such being the case, the Faridkot State had no jurisdiction, on general principles of International Law, to entertain the suit against *B* in respect of the claim, which it should be noted, was a mere personal claim as distinguished from a claim relating to land or moveables (m). The decree of the Faridkot Court was therefore an absolute nullity. *A* then sued *B* in a British Indian Court on the judgment of the Faridkot Court. The Court of first instance dismissed the suit on the ground that the Faridkot Court had no jurisdiction to entertain the suit. This decision was upheld by their Lordships of the Privy Council. The mere fact that the alleged *embroilment* took place at Faridkot was not sufficient to give jurisdiction to the Faridkot Court. The result would be the same, if the suit were for damages for breach of a *contract* entered into by *B* with *A* at Faridkot (n). In other words, a foreign Court cannot assume jurisdiction in cases where the claim is a *personal* one merely because the *cause of action* arose within its jurisdiction. But if *B* was *residing* at Faridkot at the date of the suit, the Faridkot Court would have had complete jurisdiction. In the case of *personal* claims, it is *residence* alone that gives jurisdiction in a suit against a foreigner. The same rule applies where the country in which the judgment was passed and that in which it is sought to be enforced have separate and distinct systems of administration and judicature, though owing allegiance to the same Sovereign. Thus a decree passed by the Ceylon Court [which is a foreign Court within the meaning of s. 2] in a suit on a *contract* against a native of British India who was not at the time of the action resident in Ceylon is a nullity, so that it cannot be enforced by a suit in a Court of British India (o).

(j) *Bababhat v. Narharbhat* (1889) 13 Bom. 224.

(k) *Hajimusa v. Purnanand* (1891) 15 Bom. 216.

(l) (1895) 22 Cal. 222, 21 L. A. 171.

(m) *Laksmishanar v. Vishuaram* (1900) 24 Bom.

77; *Nalla v. Mahomed* (1897) 20 Mad. 112.

(n) *Mathappa v. Chellappa* (1876) 1 Mad. 196.

(o) *Shait Akham v. Dased* (1909) 32 Mad. 469.

Ss.
13-15.

Submission to jurisdiction of foreign Court.—Where a suit is instituted in British India on the judgment of a foreign Court, effect will be given to the judgment, though that Court *had no jurisdiction* over the defendant, if the defendant appears and defends the suit brought against him in that Court without making any objection to its jurisdiction. But if he *protests against the jurisdiction*, and then proceeds to defend the suit, the judgment is a nullity, and no effect will be given to it in a suit brought on the judgment in British India (*p*).

Cl. (b)—“Not given on the merits”—*A* brings an action against *B* in the Court of the King's Bench Division of the High Court of Justice in England [a foreign Court]. An order is subsequently made on *B* to answer interrogatories. *B* fails to answer the interrogatories. Thereupon his defence is struck out and judgment is entered for *A* for the amount claimed. *A* subsequently sues *B* in the High Court of Madras upon the judgment. The judgment sued on is not one given “on the merits of the case” within the meaning of clause (b), and the suit is therefore not maintainable (*q*). Compare O. 11, r. 21.

* 14. The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

Presumption as to foreign judgment.

See notes to s. 13.

PLACE OF SUING.

15. Every suit shall be instituted in the Court of the lowest grade competent to try it.

Court in which suit to be instituted.

Scope and object of the section.—The object of the section in requiring a suitor to bring his suit in the Court of the lowest grade competent to try it, is that Courts of higher grades may not be overerowed with suits. This section is a rule of *procedure, not of jurisdiction*, and whilst it lays down that a suit shall be instituted in the Court of the lowest grade, it *does not oust the jurisdiction* of the Courts of higher grades which they possess under the Acts constituting them (*r*).

Jurisdiction.—The word “competent” used in this section has reference to the jurisdiction of a Court. Jurisdiction means the extent of the authority of a Court to entertain suits and applications and to administer justice.

Original and Appellate Jurisdiction.—A Court may have *original* or *appellate* jurisdiction or both. In the exercise of its *original* jurisdiction, a Court tries original suits instituted in that Court. In the exercise of its *appellate* jurisdiction, it hears *appeal* from decrees passed by Courts subordinate to it. There are some Courts

(*p*) *Kalyugam v. Chokalinga* (1884) 7 Mad. 103. | (*q*) *Keymer v. Visvanathan* (1917) 40 Mad. 112,
Sivaraman v. Iyrtan (1895) 18 Mad. 327; | 44 I. A. 6.
Shank Athum v. Doraid (1902) 32 Mad. 469. | (*r*) *Nidhi Lal v. Masnar* (1885) 7 All. 230.

that are Courts of original jurisdiction only, *e.g.*, the Provincial Small Cause Courts. There are some Courts that are Courts only of appellate jurisdiction, and not of original jurisdiction; thus the High Court of Allahabad is not a Court of original jurisdiction, that is to say, no *suits* can be instituted in that Court, but it has jurisdiction to hear *appeals* from decrees passed by subordinate Courts in the Province. There are other Courts which have both original and appellate jurisdiction, *e.g.*, the High Courts of Calcutta, Madras and Bombay, District Courts, etc.

Jurisdiction as regards local limits, pecuniary limits, and subject-matter.

—Each Court has its own *local* limits beyond which it cannot exercise its jurisdiction. As regards *pecuniary* limits, there are certain Courts which have no such limit imposed upon their jurisdiction, such as High Courts, District Courts, Subordinate Judges' Courts in Bengal, in the United Province, in Assam and in the Madras Presidency, and Courts of the Subordinate Judge of the first class in the Bombay Presidency. But there are other Courts that have pecuniary limits imposed upon their jurisdiction, *e.g.*, the Presidency Small Cause Courts, which cannot try suits in which the amount claimed exceeds Rs. 2,000 and Provincial Small Cause Courts, which cannot try suits in which the amount claimed exceeds Rs. 500.

There are again certain Courts which cannot try certain suits. Thus the Presidency Small Cause Courts have no jurisdiction to try suits for damages for libel and slander, suits for specific performance of a contract, suits for the recovery or partition of immovable property, suits for the foreclosure or redemption of a mortgage of immovable property, suits for dissolution of partnership or for partnership accounts, etc. This is said to be the jurisdiction of a Court as regards the *subject-matter* of a suit.

Court of lowest grade competent to try a suit.—We have in India a great number of Courts. The High Courts of Madras, Calcutta, Bombay and Allahabad have been established each by a royal Charter. The other Courts of India have been constituted by Acts of the Governor-General of India in Council. One main feature in the Acts constituting them is that they are of various grades with different pecuniary limits of jurisdiction.

In each of the three presidency-towns, we have a High Court and a Small Cause Court. As regards High Courts, they are empowered in the exercise of their ordinary original civil jurisdiction to try suits of any value, except suits falling within the jurisdiction of Presidency Small Cause Courts of which the value does not exceed Rs. 100. The pecuniary jurisdiction of Presidency Small Cause Courts is confined to suits of which the value does not exceed Rs. 2,000 (s). From the above it is clear that both a High Court and a Small Cause Court are competent to try a suit, say for Rs. 500, for damages for breach of a contract. But of these two Courts it is the Small Cause Court that is the "Court of the lowest grade" in a presidency-town, competent to try the suit. The suit, therefore, "shall" be instituted in the Small Cause Court as required by the present section. This does not mean that the High Court has no jurisdiction to entertain the suit. It has jurisdiction to try the suit, but in order that the High Court may not be overcrowded with suits, the legislature has established Small Cause Courts, and the present section requires that suits which a Small Cause Court is competent to try shall be brought in that Court.

(s) Presidency Small Cause Courts Act, 1882, s. 18.

Ss.
15, 16.

Principles regulating pecuniary jurisdiction.—It is the *plaintiff's valuation in his plaint* which fixes the jurisdiction not only of the first Court but of the appellate Court, and not the amount which may be found and *decreed* by the first Court or the appellate Court (*l*).

Suits to be instituted where subject-matter situate.

16. Subject to the pecuniary or other limitations prescribed by any law, suits—

- (a) for the recovery of immoveable property with or without rent or profits.
- (b) for the partition of immoveable property,
- (c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immoveable property,
- (d) for the determination of any other right to or interest in immoveable property,
- (e) for compensation for wrong to immoveable property,
- (f) for the recovery of moveable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate :

Provided that a suit to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business or personally works for gain.

Explanation.—In this section “property” means property situate in British India.

Chartered High Courts.—This section does not apply to Chartered High Courts in the exercise of their Ordinary Original Civil Jurisdiction [s. 120].

Scope of the section.—This section indicates the Court in which suits relating to *immoveable property* and suits for the recovery of *moveable property actually under distraint or attachment* are to be instituted. Section 19 indicates the Courts in which

(l) *Lakshman v. Babaji* (1887) 8 Bom. 41; *Mahabir Singh v. Bhari Lal* (1891) 31 All. 320.

suits for compensation for wrong done to the person or to moveable property are to be instituted. Section 20 is a general section. S. 16.

Clause (a): suits for recovery of immoveable property.—A suit for the recovery of immoveable property situate in Bombay must be instituted in a Court in Bombay having jurisdiction to entertain the suit. The Small Cause Court in Bombay has no jurisdiction to try such suit (u). The suit must therefore be brought in the High Court of Bombay. Hence it is that the section commences with the words "subject to the pecuniary or other limitations prescribed by any law."

Clause (d): suits for the determination of any other right to, or interest in, immoveable property.—There is no definition of immoveable property in the Code. "Immoveable property" is defined in the general Clauses Act, 1897, s. 3, cl. (25), as including land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth. Trees standing on land are immoveable property (v). But once the trees are severed from the land, they assume the character of moveable property. Growing crops are moveable property (see s. 2, pl. 13). "Immoveable property," we have said, includes "benefits to arise out of land." Rent that has already accrued due is moveable property, for it is a benefit that has arisen out of land, but rent that is to accrue due is immoveable property, for it is a "benefit to arise out of land." Hence a suit for *recovery* of rent is governed not by the provisions of this section but by those of s. 20, and it may be instituted in any one of the Courts specified in that section, although in such suit the plaintiff's *title* to the property of which the rent is claimed may *incidentally* come in question (w). But a suit for a *declaration* of the plaintiff's *right* (or *title*) to rent comes under cl. (d) of the present section, and must be instituted in the Court within the local limits of whose jurisdiction the property is situate (x). A suit to recover a share of the *sale-proceeds* of land that have already been realized, is a suit for money governed by the provisions of s. 20 (y).

Clause (e): wrong to immoveable property. This refers to torts affecting immoveable property, such as trespass, nuisance, infringement of easements, etc.

Proviso to the section.—The last paragraph of the section provides that suits to obtain relief respecting, or compensation for wrong to, immoveable property, may be instituted *at the plaintiff's option* either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain, provided—

- (1) the property is held by or on behalf of the defendant;
- (2) the relief sought can be entirely obtained through the personal obedience of the defendant, and
- (3) the property is situate in, and not beyond, British India (z).

Actually and voluntarily "resides."—There are very few cases bearing on the word "reside." But there are many cases bearing on the word "dwell" in clause 12 of the charter. As there does not appear to be any difference between "reside" within the meaning of ss. 16, 19 and 20 and "dwell" within the meaning of cl. 12 of

(u) See Presidency Small Cause Court Act, 1882, s. 19.

(v) *Sakharam v. Vishram* (1896) 19 Bom. 207.

(w) *Chintaman v. Mahadav* (1889) 6 B. H. C.A. C. 29.

(x) *Keshav v. Vinayak* (1899) 23 Bom. 22.

(y) *Venkata v. Krishnaswami* (1899) 6 Mad. 344;

Ahmed v. Abdul Rehman (1904) 24 All. 808.

(z) *Krishnejit v. Gajanan* (1899) 33 Bom. 373.

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the Charter (a), we may note the leading decisions bearing on the term "dwell." The dwelling or residence contemplated by clause 12 must be of a more or less permanent character. It must be of such a nature as to show that the High Court in which a defendant is sued is his natural *forum* (b). Hence it follows that where a party has got a permanent place of dwelling in one place, he cannot be said to "dwell" at a place where he has lodged for a temporary purpose only, *e.g.*, to defend a suit brought against him (c), or for a change while on leave (d). Every person is deemed in law to have a dwelling or place of residence, and where a person has no permanent place of residence, he will be deemed to "dwell" where he is actually staying at the time. Thus where a defendant, who was Political Agent at Kolhapur, left Kolhapur *en route* for England on a year's furlough after having sold off the furniture and other effects at Kolhapur where he lived in a house belonging to Government, and came to Bombay and stayed there for three days before sailing for England, it was held that he "dwelled" in Bombay so as to give jurisdiction to the High Court in a suit instituted against him during his stay in Bombay (c).

A person may have more than one permanent place of residence at the same time. In such a case he will be deemed to "dwell" in any one of the places where he is actually staying for the time being, and he may be sued in that place (f). Where a person who was domiciled and resided in Mysore left his house in charge of a servant, and hired a house in Madras to which he brought his wife and family, and apprenticed himself for a year to a Vakil in Madras, it was held in a suit brought against him in Madras some months after his residence there, that inasmuch as he had taken up his abode in Madras, meaning to remain there for several months, and was actually living there when the suit was instituted, he "dwelled" in Madras within the meaning of cl. 12 of the Charter (g).

Carries on business.—These words also occur in cl. 12 of the Charter, and the decisions under that clause apply equally to cases arising under ss. 16, 19 and 20. For a person to be said to "carry on business" at a place, it is not necessary that he should have an office or a regular place of business there. Thus a person residing in the Mufassal, who goes once or twice a week from the Mufassal to a friend's house in Calcutta, and does business there, will be said to "carry on business" in Calcutta (h). Nor is it necessary that the business should be conducted by him *personally* (i). It may be carried on by an *agent* employed by him, who attends *exclusively* to his business. The person acting as agent must be an *agent in the strict sense of the term*. A manager of a joint Hindu family is not an "agent" within the meaning of this condition (j).

17. Where a suit is to obtain relief respecting, or compensation for wrong to, immoveable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate :

(a) *Goswami v. Govardhanlalji* (1890) 14 Bom. 541, 547.

(b) 14 Bom. 541, 552, *supra*.

(c) *Emrickoll v. Kid* (1864) 2 Hyde. 119.

(d) *Kasariji v. Wallace* (1863) 1 B. H. C. 112.

(e) *Fernandez v. Wray* (1901) 25 Bom. 176.

(f) *Orde v. Skinner* (1880) 3 All. 9, 7 I. A. 106

(g) *Srinivasa v. Venkata* (1911) 34 Mad. 257, 38 I. A. 129.

(h) *Greenchundur v. Collins* (1864) 2 Hyde 79.

(i) *Muthaya v. Allen* (1881) 4 Mad. 269.

(j) *Annamalai v. Murugasa* (1903) 26 Mad. 544, 30 I. A. 220.

Suits for immoveable property situate within jurisdiction of different Courts.

Provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such Court.

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17, 18.

Scope and object of the section.—The provisions of this section are intended for the benefit of suitors, the object being to avoid plurality of suits (*k*). *A* sues *B* in a Court in district *X* on a mortgage of two properties, one situate in district *X* and the other in district *Y*. The Court in district *X* has jurisdiction under this section to *order the sale* not only of the property in district *X*, but the property in district *Y*, and also to *sell in execution of its decree* the property in district *Y* (*l*). It is not necessary for *A* to bring two suits, one in the Court in district *X* and the other in the Court in district *Y*. In the above case there are *two* properties situate in different districts. It does not make any difference, if it is *one* entire property situate in *different* districts (*m*). The same principle applies to suits for partition (*n*) and to suits for the recovery of immoveable property (*o*).

Chartered High Court.—This section does not apply to Chartered High Courts in the exercise of their original civil jurisdiction (see s. 120).

18. (1) Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts any immoveable property is situate one of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction :

Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction.

(2) Where a statement has not been recorded under sub-section (1), and an objection is taken before an appellate or revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the appellate or revisional Court shall not allow the objection unless in its opinion there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice.

(k) *Harchand v. Lal Bahadur* (1894) 16 All. 359.
(l) *Alaseyk v. Steel* (1877) 14 Cal. 661; *Gopi Mohan v. Neogybekt* (1893) 19 Cal. 13; *Tinkouri v. Sib Chandra* (1894) 21 Cal. 630.

(m) *Shurroz Chunder v. Amirunnissa* 1882 8 Cal. 703.
(n) *Khatija v. Ismail* (1839) 12 Mad. 380.
(o) *Kabra Jan v. Ram Bali* (1908) 30 All. 560.

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19, 20.

19. Where a suit is for compensation for wrong done to the person or to moveable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts.

Suits for compensation
for wrong to person or
moveable.

Illustrations.

(a) *A*, residing in Delhi, beats *B* in Calcutta. *B* may sue *A* either in Calcutta or in Delhi.

(b) *A*, residing in Delhi, publishes in Calcutta statements defamatory of *B*. *B* may sue *A* either in Calcutta or in Delhi.

20. Subject the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

Other suits to be institu-
ted where defendants reside
or cause of action arises.

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

Explanation I.—Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

Explanation II.—A corporation shall be deemed to carry on business at its sole or principal office in British India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place. S. 20.

Illustrations.

(a) *A* is a tradesman in Calcutta. *B* carries on business in Delhi. *B*, by his agent in Calcutta, buys goods of *A* and requests *A* to deliver them to the East Indian Railway Company. *A* delivers the goods accordingly in Calcutta. *A* may sue *B* for the price of the goods either in Calcutta, where the cause of action has arisen, or in Delhi, where *B* carries on business.

(b) *A* resides at Simla, *B* at Calcutta and *C* at Delhi. *A*, *B* and *C* being together at Benares, *B* and *C* make a joint promissory note payable on demand, and deliver it to *A*. *A* may sue *B* and *C* at Benares, where the cause of action arose. He may also sue them at Calcutta, where *B* resides, or at Delhi, where *C* resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the Court.

Chartered High Courts.—This section does not apply to Chartered High Courts in the exercise of their original civil jurisdiction (see s. 120).

Scope of the section.—The provisions of this section are to be read subject to the provisions of sections 16 and 19 (*p*). The present section provides that suits falling under it may be brought *at the plaintiff's option* (1) either where the cause of action arises or (2) where the defendant resides, or carries on business, or personally works for gain (*q*).

Actually and voluntarily resides.—See notes to s. 16 under the same head. Note that the word "residence" in this section comprises also the temporary lodging of a defendant in respect of a cause of action arising at the place where he has such temporary lodging: see Explanation I to the section.

Carries on business.—See notes to s. 16 under the same head. With this read Explanation II.

Leave of Court.—The leave to sue referred to in clause (b) may be given even after the institution of the suit (*r*).

Cause of action.—"Cause of action" means every fact which it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved to entitle him to a decree (*s*). It has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the

(p) *Fazlur Rahman v. Dwarika Nath* (1903) 30 Cal. 453.

(q) *Rathayiri v. Syed Faza* (1896) 19 Mad. 477.

(r) *Narayan v. Secretary of State* (1906) 31 Bom.

570.
(s) *Read v. Brown* (1888) L. R. 22 Q. B. D. 128, 131.

- S. 20. grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour (t).

Cause of action in suits on contracts.—In a suit for damages for breach of contract, the cause of action consists of the *making* of the contract, and of its *breach* in the place where it ought to be performed (u). Hence in the case of a contract the *whole* cause of action would be said to have arisen in a particular place, say Poona, if the contract was made in Poona, and the breach of it also took place at Poona. But if the contract was made in Bombay, and the breach took place at Poona (where it was to be performed), or if it was entered into in Poona, and the breach took place at Bombay (where it was to be performed), part of the cause of action would be said to have arisen in Bombay and part in Poona. Whether the whole cause of action arose in Poona or a part only of the cause of action arose in Poona, a suit on the contract may be instituted in the Poona Court as provided by clause (c).

Cause of action in other suits.—A suit for restitution of conjugal rights may be brought in the Court of the place where the husband resides, or it may be brought in the Court of the place where the wife resides (v). A suit by a guardian for the custody of his ward removed by the defendant from Allahabad to Lahore may be brought in the Court at Lahore or it may be brought in the Court at Allahabad (w). Similarly, a suit for damages for infringement of a trade-mark may be brought in the Court of the place where the defendant resides, or in the Court of the place where the defendant published advertisements which constitute an infringement of the trade-mark (x).

Suits against non-resident foreigners.—We now proceed to consider the applicability of the section where the defendant is a foreigner residing out of British India. If a foreigner (that is, a non-British subject, resides, or *himself* carries on business, or *personally* works for gain, in British India, it is clear that he is amenable to the jurisdiction of British Indian Courts. But what if a foreigner does not reside, or does not *himself* carry on business or *personally* work of gain, in British India, and

- (1) the *cause of action* arises within the local limits of a British Indian Court, or
- (2) the cause of action also does not arise within the local limits of any British Indian Court (*i.e.*, it arises in a foreign country), but he carries on business *through his agent* within the local limits of a British Indian Court?

As to case (1), it is settled that a non-resident foreigner, who is a subject of a Native State, may be sued in the Court of British India, if the *cause of action* arises within the jurisdiction of any such Court (y). Thus if A, a subject of the Native State of Sangli, and resident therein, borrows money from B at Belgaum, B may sue A for recovery of the money in the Belgaum Court, for the cause of action has arisen at Belgaum.

As to case (2), the point was raised in a recent case before their Lordships of the Privy Council, but was not decided by their Lordships (z).

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| <p>(t) <i>Chand Kour v. Partab Singh</i> (1889) 15 Cal. 98, 102, 15 I. A. 150.</p> <p>(u) <i>Dhanjisha v. Ejarde</i> (1887) 11 Bom. 649, 652; <i>Rampartab v. Premab</i> (1891) 15 Bom. 93; <i>Dobson v. Bengal Spp. and Wry. Co.</i> (1897) 21 Bom. 126; <i>Seehyngiri v. Nawab Askar</i> (1904) 27 Mad. 494.</p> <p>(v) <i>Lakhtagar v. Bai Suraj</i> (1894) 18 Bom. 316.</p> <p>(w) <i>Sarat Chandra v. Forman</i> (1890) 12 All. 213.</p> | <p>(x) <i>Kheshta v. Pancham Singh</i> (1915) 37 All. 446.</p> <p>(y) <i>Ram Raji v. Prathaddas</i> (1896) 20 Bom. 133; <i>Girdhar v. Kastigar</i> (1893) 17 Bom. 662; <i>Tadepalli v. Nawab Sayed</i> (1906) 29 Mad. 59; <i>Rambhat v. Shankar</i> (1901) 25 Bom. 528.</p> <p>(z) <i>Annamalai v. Murugava</i> (1908) 26 Mad. 544, 30 I. A. 229.</p> |
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21. No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

Objections to jurisdiction.

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21, 22.

Scope of the section.—Note that the section is confined to objections to jurisdiction as regards the *place of suing*.

Objection to jurisdiction, when to be raised.—The plea of want of jurisdiction may be taken at any stage of the proceedings (a). In a recent case, where the objection to jurisdiction was taken in the Court of the first instance, but it was not taken on appeal to the High Court, nor on the appeal to the King in Council, and the point was again raised in the argument before the Privy Council, their Lordships entertained the objection, and said: "Seeing that it is a question of *jurisdiction*, and *depends on no disputed facts*, their Lordships are of opinion that they cannot decline to entertain it, although it is not specifically raised on the appeal, more especially as it necessarily presented itself in the argument" (b).

Waiver of plea to jurisdiction.—Where a Court has no jurisdiction over the subject-matter of a suit, no waiver on the part of the defendant can confer jurisdiction upon the Court. "Where no jurisdiction exists, no action on the part of the plaintiff, no inaction on the part of the defendant, can invest the Court with any of the elements of power or of vitality, so as to convert the proceeding before it into a proper judicial process" (c). The question of waiver to the plea of jurisdiction can only arise where a Court has jurisdiction over the subject-matter, but there are *irregularities in the initial procedure* which, if objected to at the time, would have led to the dismissal of the suit. As observed by their Lordships of the Privy Council, "when in a cause which the judge is competent to try, the parties without objection join issue and go to trial *upon the merits*, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were *irregularities in the initial procedure* which, if objected to at the time, would have led to the dismissal of the suit" (d).

22. Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which

Power to transfer suits which may be instituted in more than one Court.

(a) *Nidhi Lal v. Mazar Husain* (1883) 7 All. 230.

(b) *Maha Prasad v. Ramani Mohan* (1914) 42 Cal. 116, 136, 41 I. A. 197, 204.

(c) *Rajlakshmi v. Katayani* (1910) 38 Cal. 699, 609.

(d) *Ledgar v. Bull* (1887) 9 All. 191, 13 I. A. 13

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Power of Court to stay suit pending before it.—Sections 22-24 deal with the power of the Court to transfer, not with the power of the Court to stay. But a Court has inherent jurisdiction to stay any suit which is an abuse of the process of the Court (s. 151). Whether the institution of a suit in a particular Court is an abuse of the process of the Court is a question of fact in each case. *A* sues *B* in the Bombay High Court for damages for defamation alleged to be contained in the *Bombay Gazette*, a daily journal published in Bombay. *A* and *B* both reside at Wardha in the Central Provinces. *B* applies for an order that the suit be stayed and the plaint returned to *A*, in order that, if *A* thought proper, it may be presented to the Court at Wardha. The grounds of the application are that neither he (*L*) nor the plaintiff (*A*) resides or carries on business in Bombay, and that all his (*B*'s) witnesses reside at Wardha. These facts are not sufficient to support *B*'s application for a stay of the suit in the Bombay Court (*c*).

23. (1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under section 22 shall be made to the Appellate Court.

To what Court application lies

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court.

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate.

24. (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage—

General power of transfer and withdrawal.

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

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- (i) try or dispose of the same ; or
- (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same ; or
- (iii) retransfer the same for trial or disposal to the Court from which it was withdrawn

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1) the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer either retry it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

Jurisdiction.—An order for the transfer of a suit from one Court to another cannot be made under this section unless the suit has been *in the first instance* brought in a Court *having jurisdiction*. Such an order, if made, is void. And even though it may have been made by *consent of parties*, it is open to either party, notwithstanding such consent, to contend that it is void. But if after the transfer is made, the parties without objection join issue and go to trial *upon the merits*, the order of transfer cannot subsequently be impeached (f)

District Court.—District Court in this section means a Court of *unlimited* pecuniary jurisdiction. An order of transfer under this section cannot therefore be made by an Assistant Judge whose pecuniary jurisdiction is *limited* to suits of a certain value (g)

Power of Court to stay suit pending before it.—See notes under the same head to s. 22 above.

Clause (a).—The Nagpur Court is not subordinate to the Bombay High Court within the meaning of this clause (h)

25. (1) Where any party to a suit, appeal or other proceeding pending in a High Court presided over by a single Judge objects to its being heard by him and the Judge is satisfied that there are reasonable grounds for the objection, he shall

Power of Governor General in Council to try a suit

(f) *Ledger v. Bull* (1887) 9 All. 191 L. J. A. 134 | (h) *Wallace v. Wallace* (1916) 50 Bom. 109
(g) *Hari Charan v. Gurdas* (1910) 31 Bom. 411

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make a report to the Governor-General in Council, who may, by notification in the *Gazette of India*, transfer such suit, appeal or proceeding to any other High Court.

(2) The law applicable to any suit, appeal or proceeding so transferred shall be the law which the Court in which the suit, appeal or proceeding was originally instituted, ought to have applied to such case.

Object of the section.—The object of this section is to empower the Governor-General in Council to transfer cases from one High Court to another under certain circumstances.

INSTITUTION OF SUITS.

26. Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

Institution of suit.

See O. 4, r. 1.

SUMMONS AND DISCOVERY.

27. Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed.

Summons to defendant.

Issue and service of summons.—See O. 5 below.

28. (1) A summons may be sent for service in another province to such Court and in such manner as may be prescribed by rules in force in that province.

Service of summons where defendant resides in another province.

(2) The Court to which such summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto.

See notes to O. 5, r. 23.

29. Summonses issued by any Civil or Revenue Court situate beyond the limits of British India may be sent to the Courts in British India and served as if they had been issued by such Courts :

Service of foreign summonses.

Provided that the Courts issuing such summonses have been established or continued by the authority of the Governor-General in Council, or that the Governor-General in Council has, by notification in the *Gazette of India*, declared the provisions of this section to apply to such Courts.

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30. Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party,—

Power to order discovery
and the like

- (a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;
- (b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;
- (c) order any fact to be proved by affidavit.

These subjects are dealt with in Orders 11, 12, 13, 16 and 19.

31. The provisions in sections 27, 28 and 29 shall apply to summonses to give evidence or to produce documents or other material objects.

Summon- to witness.

32. The Court may compel the attendance of any person to whom a summons has been issued under section 30 and for that purpose may—

Penalty for default.

- (a) issue a warrant for his arrest;
- (b) attach and sell his property;
- (c) impose a fine upon him not exceeding five hundred rupees;
- (d) order him to furnish security for his appearance and in default commit him to the civil prison.

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33, 34.

JUDGMENT AND DECREE.

33. The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow.

Judgment and decree.

INTEREST.

34. (1) Where and in so far as a decree is for the payment of money, the Court may in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rates as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

Interest.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie.

Scope of the section.—This section applies only where the decree is for the payment of "money." It does not apply where the decree is for the enforcement of a mortgage or charge.

The three divisions of interest.—Interest that may be awarded to a plaintiff in a suit for money may be divided into three heads, according to the period for which it is allowed, namely,—

- (1) interest accrued due prior to the institution of the suit on the principal sum adjudged (as distinguished from the principal sum claimed);
- (2) additional interest on the principal sum adjudged, from the date of the suit to the date of the decree, "at such rate as the Court deems reasonable";
- (3) further interest on the aggregate sum adjudged, i.e., the principal sum plus interest allowed under heads (1) and (2), from the date of the decree to (i) the date of realization or (ii) to such earlier date as the Court thinks fit. "at such rate as the Court deems reasonable."

This section does not apply to the first head of interest. It applies only to the second and third heads.

I. Interest prior to date of suit.—As has just been said, this head of interest does not come within the purview of the present section. It is governed by other enactments to be presently noted. The subject may be considered under the following two heads:

(1) where there is a stipulation for the payment of interest at a fixed rate,

S. 34.

(2) where there is no stipulation at all for the payment of interest.

1. If the rate of interest is stipulated, the Court must allow that rate upto the date of the suit, however high or usurious it may be. This is the law laid down in the Usury Laws Repeal Act 28 of 1855, s. 2. But if the rate agreed on is in the nature of a penalty, the Court may award interest at such rate as it deems reasonable.

2. If there is no stipulation for payment of interest, the plaintiff is not entitled to interest except in the following three cases :—

(i) *Negotiable Instruments Act* 26 of 1883, s. 80.—When no rate of interest is specified in a promissory note or bill of exchange, interest will be awarded at the rate of 6 per cent. per annum from the date on which the amount claimed became due and payable.

(ii) *Interest Act* 32 of 1839.—Where there is no stipulation to pay interest, but the amount claimed is a sum certain (as distinguished from unascertained damages), and is payable at a certain time by virtue of one “written instrument,” the Court will allow interest at a rate not exceeding the current rate of interest from the date on which the amount became payable. If no time is fixed for the payment of the amount, the Court will award interest at the rate aforesaid from the time the creditor demands payment in writing intimating to the debtor that interest will be claimed from the date of such demand up to the date of payment.

(iii) *Mercantile usage*.—In other cases interest may be allowed if there is a mercantile usage to pay interest.

II. Interest from date of suit to date of decree.—The rate of interest from the date of the suit to the date of the decree is in the discretion of the Court, and this discretion is not excluded even if a fixed rate is mentioned in the contract as payable “up to realization” (i). But though the rate of interest for the aforesaid period is discretionary, the Court should, in the exercise of that discretion, award interest at the contract rate, unless it would be inequitable to do so (j).

III. Interest from date of decree to date of realization.—The rate of interest from the date of the decree to the date of realization is also in the discretion of the Court. “The plaintiff getting security of a decree, has his interest reduced in the generality of cases” (k). If the Court awards interest from the date of the decree, but no rate is specified, the decree-holder will be entitled to interest at the Court rate, which is 6 per cent. (l). But if such interest is not given in the decree, it will be deemed to have been refused : see para. 2, of the section.

Illustration of the above rules.—A lends Rs. 5,000 to B to be repaid with interest at the rate of 24 per cent. per annum. In a suit by A to recover the amount of the loan with interest at the rate aforesaid, it is contended on behalf of B that the rate of interest is penal (Contract Act. s. 74). The Court finds that the rate of interest is not penal. Hence—

(1) as regards interest [on Rs. 5,000] from the date of the loan to the date of the suit, the Court must allow it at the contract rate, that is, at the rate of 24 per cent. per annum : Usury Laws Repeal Act, s. 2 ;

(i) *Magniram v. Dhoutal Roy* (1886) 12 Cal. 569 ;
Carvalho v. Nurbibi (1879) 3 Bom. 202 ;
Umes Chunder v. Fatima (1891) 18 Cal. 164,
 180, 17 I. A. 201. (j) *Orde v. Skinner* (1876) 3 All. 91, 106, 7 I. A. 180.
 (k) *Umes Chunder's case supra*.
 (l) *Rani Lalum v. Bokari* (1871) B. L. R. App. 30.

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34, 35.

- (2) as regards interest [on Rs. 5,000] from the date of the suit to the date of the decree, the Court *may* allow it at the contract rate, that is, at the rate of 24 per cent. per annum. or it may in its discretion allow it at a lower rate or may disallow it altogether;
- (3) as regards interest from the date of the decree to the date of realization on the aggregate sum adjudged [*i.e.*, Rs. 5,000 *plus* the interest adjudged under the above two heads], the Court may allow interest at such rate as it deems reasonable. This rate is usually 6 per cent. As to interest on costs, see s. 35. cl. (3)

COSTS.

35. (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.

(3) The Court may give interest on costs at any rate not exceeding six per cent. per annum, and such interest shall be added to the costs and shall be recoverable as such.

“Costs of and incident to a suit.”—This expression includes not only the costs of a suit, but costs of *applications* in the suit.

Costs to be in the discretion of the Court.—The section provides that the costs of suits and applications shall be in the discretion of the Court. The general rule is that *costs shall follow the event* unless the Court, for good reason, otherwise orders. This means that the successful party is entitled to costs unless he is guilty of misconduct, or there is some other good cause for not awarding costs to him (*m*). The Court may not only consider the conduct of the party in the *actual* litigation, but the matters which *led up* to the litigation (*n*). A refusal to go to arbitration is no ground for refusing costs (*o*); nor is the fact that the plaintiff brought his action without previous notice to the defendant (*p*). An offer of compromise, which the Court considers insufficient, is no bar to a plaintiff's right to costs (*q*).

<p>(m) <i>Kuppuswami v. Zamindar of Kalahasti</i> (1904) 27 Mad. 341; <i>Rodeshwar v. Manroop</i> (1885) 13 I. A. 21, 31 (useful plaintiff); <i>Bhubaneswari v. Nilomul</i> (1886) 12 Cal. 18, 21, 12 I. A. 137 (successful defendant).</p> <p>(n) <i>Bostock v. Ramson</i> Urban District Council</p>	<p>{1900} 1 Q. B. 357, 360, affirmed [1900] 2 Q. B. 616.</p> <p>(o) <i>Beckett v. Stiles</i> (1888) 5 Times R. p. 88.</p> <p>(p) <i>Goodhart v. Hyett</i> (1883) 25 C. D. 182.</p> <p>(q) <i>Fennessy v. Day and Martin</i> (1880) 5 L. T. 161</p>
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"Costs shall follow the event" means costs shall follow upon success. "Event" means result of the suit (*r*). S. 35.

Costs against person not a party to the suit.—An order for costs cannot be made against persons who are not parties to the suit (*s*). As regards an action for costs against a third person on the ground that he was the mover of and had an interest in a suit it has been held by the Privy Council that such an action cannot be maintained in the absence of malice and want of probable cause (*t*).

No separate suit for costs.—If costs are not awarded to a party, he cannot bring a separate suit for costs. If costs are awarded, no separate suit will lie to realise these costs. The proper procedure in such case is, if the costs are awarded by a decree, to realise the costs by execution of the decree, and, if the costs are awarded by an order, to realise them by executing the order.

Whether an appeal lies for costs only?—It is settled that an appeal will lie for costs only when the costs are awarded by a "decree," if the order as to costs involves a question of principle; but it is not settled whether such an appeal will lie, if no question of principle is involved. A decree contains

1. a decision on the rights of parties in the suit—this we shall call item No. 1—and
2. a direction as to costs—this we shall call item No. 2.

A party, while appealing from item No. 1 or any part thereof, may appeal also from item No. 2. He may at the hearing abandon the appeal from item No. 1, and yet he is entitled to proceed with the appeal from item No. 2 (*u*). But can he appeal from item No. 2 alone without appealing from item No. 1? In other words, does an appeal lie on a matter of costs only?

All the High Courts are agreed that such an appeal does lie—

- (1) where the order as to costs involves a matter of principle (*v*), as where a formal party to a suit against whom no relief is claimed is made to pay the costs of the suit (*w*);
- (2) where there has been no real exercise of discretion in making the order as to costs. This may happen when a successful party is made to pay the costs of the losing party (*x*).

So long as the discretion was *in fact* exercised, an appellate Court will not interfere, merely because it would itself have exercised the discretion differently (*y*);

- (3) where the order as to costs proceeds upon a misapprehension of fact or law (*z*).

For brevity's sake we shall describe all the three cases as cases where a question of "principle" is involved. We may therefore say that it is settled law that an appeal will lie for costs only, where the order as to costs involves a question of principle. But it is not settled whether an appeal will lie for costs only, where no question of principle is involved.

(*r*) *Field v. G. N. Ry. Co.* (1878) 3 Ex. D. 261.
 (*s*) *James Bayis v. Turner* (1883) 7 Bom. 485.
 (*t*) *Ram Coomarr Coondoo v. Chunder Kanto Mookerji* (1878) 2 Cal. 233, 4 I. A. 23.
 (*u*) *Vasudev v. Bhawan* (1892) 16 Bom. 241.
 (*v*) *Secretary of State v. Marjum* (1895) 11 Cal. 359;

Dildar Ali Khan v. Bhawant Sahat Singh (1907) 34 Cal. 878.
 (*w*) *Bunwari Lall v. Drup Nath* (1886) 12 Cal. 179.
 (*x*) *Moshingan v. Mozari* (1886) 12 Cal. 271.
 (*y*) *Parshram v. Dorabji* (1900) 2 Bom. L. R. 254.
 (*z*) *Runchordas v. Bai Kasi* (1892) 16 Bom. 676.

PART II.

Execution.

GENERAL.

- 36.** The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders.
- Application to order.

What decrees may be executed.—*The only decree capable of being executed is the decree of the Court of last instance.*—When an appeal is preferred from a decree, and a decree is passed in appeal, the question frequently arises as to which decree is the one capable of execution, the decree of the lower Court or the decree of the appellate Court. The cases establish that where an appeal is *dismissed*, as where the appellant does not appear at the hearing [see O. 41; r. 11], the decree capable of execution is the *decree appealed from* (a). But where the appellate Court varies, reverses, or confirms the decree appealed from, the decree capable of execution is the *decree of the appellate Court*, whether it varies, reverses or confirms the decree appealed from (b).

- 37.** The expression “Court which passed a decree,” or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context be deemed to include,—
- Definition of Court which passed a decree.

- (a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and
- (b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

(a) *Abdul Majid v. Jawahir Lal* (1914) 36 All. 350 [P. C.]; *Batuk Nath v. Munnai Dei* (1914) 36 All. 284, 41 I. A. 104; *Patloji v. Ganu* (1890) 15 Bom. 370 [appeal withdrawn]; *Shyam v. Satinath* (1917) 44 Cal. 554.

(b) *Shohrat v. Bridgman* (1882) 4 All. 376 [F. B.]

Muhammad v. Muhammad (1888) 11 All. 207 [F. B.]; *Mahomed v. Mohini Kanta* (1907) 34 Cal. 874; *Raja Bhup Indar v. Bijai Bahadur* (1900) 5 C. W. N. 52, 271 A. 209; *Satwaji v. Sakharlal* (1914) 39 Bom. 175.

Court by which decrees may be executed.—Section 38 indicates the Courts by which decrees may be executed. A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. The present section explains the meaning of the expression “Court which passed a decree.”

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37-39.**

The expression “Court which passed a decree” includes not only the Court which actually passed the decree, but the Courts mentioned in clauses (a) and (b) of the present section. Reading sections 37 and 38 together, we obtain the following rules:—

1. Where the decree to be executed is a decree of a Court of first instance, the proper Court to execute it is the Court of first instance.
2. Where the decree to be executed is a decree passed by a Court of first appeal, the proper Court to execute it is also the Court of first instance [see cl. (a) of the section.]
3. Where the decree to be executed is a decree passed by the High Court in second appeal, then also the proper Court to execute it is the Court of first instance. Thus where a suit is instituted in the Court of a Subordinate Judge, and an appeal from the decree is preferred to the District Court, and a second appeal to the High Court, the proper Court to execute the decree of the High Court is the Court of first instance, that is, the Court of the Subordinate Judge.
4. Where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the only Court that can execute the decree is the Court mentioned in cl. (b) of this section.

COURTS BY WHICH DECREES MAY BE EXECUTED.

38. A decree may be executed either by the Court which passed it, or by the Court, to which it is sent for execution.

Court by which decree
may be executed

The Court executing a decree cannot go behind the decree.—The Court executing a decree must take the decree as it stands (c). It has no power to go behind the decree, in other words, it cannot entertain any objection as to the legality or correctness of the decree (d). The reason is that a decree, though it may not be according to law, is binding and conclusive between the parties, if it is not appealed from (e). For the same reason, the Court executing a decree cannot alter, vary, or add to, the terms of the decree (f).

39. (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court,—

Holder of decree.

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on

(c) *Muttia v. Varammal* (1887) 10 Mad. 241.
Sheik Budan v. Ramchandra (1887) 11 Bom. 537; *Appa Rao v. Krishna* (1892) 25 Mad. 537.
 (d) *Gursh Chunder v. Shoshi Shikareswar* (1900) 27 Cal. 951, 967, 27 I. A. 110.
 (e) *Pepemba v. Vira Pratapa* (1896) 19 Mad. 219,

21 I. A. 35.
 (f) *Udavant v. Tokhan Singh* (1901) 28 Cal. 953, 28 I. A. 67; *Forester v. Secretary of State* (1878) 3 Cal. 161, 4 I. A. 137; *Hurro v. Sarat* (1882) 8 Cal. 332, 9 I. A. 1; *Ranmal-singji v. Kundankumar* (1902) 26 Bom. 707.

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39-41.

business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed the decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

Transmission of decrees for execution.—A decree passed by one Court may be transmitted for execution to another Court either *on the application of the decree-holder* on one of the grounds stated in this section, or by the Court which passed it *of its own motion*. When a decree is sent by the Court which passed it for execution to another Court, the Court sending the decree should send a copy of the decree and other documents mentioned in O. 21, r. 6, to the Court by which the decree is to be executed. The latter Court should on receiving the copy of the decree and the other documents, cause the same to be filed (O. 21, r. 7). The decree-holder may then apply to that Court for execution (O. 21, r. 10). The Court executing a decree sent to it for execution has the same powers in executing such decree as if it had been passed by itself (s. 42).

40. Where a decree is sent for execution in another province it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that province.

Transfer of decree to Court in another province.

41. The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution or where the former Court fails to execute the same, the circumstances attending such failure.

Result of execution proceedings to be certified.

42. The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

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42-43.**

e Power of Court in executing transferred decree.

▼ **Powers of Court in executing transferred decree.**—A Court executing a transferred decree has no power to entertain any objection regarding—

- (a) the legality or propriety of the order directing execution, or
- (b) the right of the person shown in the order as the person entitled to execute the decree.

By reason of the rule contained in cl. (a), the Court executing a transferred decree cannot refuse execution on the ground that the order directing execution was wrong or improper, and that it ought not to have been made under the particular circumstances of the case (*g*). Nor can it refuse execution on the ground that the execution of the decree was barred by limitation on the date on which the order for execution was made, and that order was therefore illegal (*h*).

By reason of the rule contained in cl. (b), the Court executing a transferred decree cannot entertain any question as to the validity of an assignment of the decree (O. 21, r. 16), provided the assignee is shown in the order for execution as the person entitled to execute the decree (*i*).

Subject to the limitations mentioned above, the Court executing a transferred decree has the same powers in executing such decree as if the decree had been passed by itself; it has no more powers than a Court executing its own decree.

Continuance of jurisdiction of Court executing transferred decree.—The Court to which a decree is sent for execution retains its jurisdiction to execute the decree (1) until the execution has been withdrawn from it (*j*), or (2) until it has executed the decree and has certified that fact to the Court which sent the decree or (3) until it has failed to execute the decree and has certified that fact to the Court which sent the decree (s. 41).

43. Any decree passed by a Civil Court established in any part of British India to which the provisions relating to execution do not extend, or by any Court established or continued by the authority of the Governor-General in Council in the territories of any foreign Prince or State, may, if it cannot be executed within

Execution of decrees passed by British courts in places to which this Part does not extend or in foreign territory.

(g) *Mulla Abdul v. Sakhin-boo* (1897) 21 Bom. 436.

(h) *Husen v. Saifu* (1901) 15 Bom. 28.

(i) *Itan Chander v. Mohendro Nath* (1873) 21 W. R. 141.

(j) *Ashotoh Dill v. Doorga* (1861) 6 Cal. 501.

Ss. the jurisdiction of the Court by which it was passed, be executed
43-46. in manner herein provided within the jurisdiction of any Court in British¹ India.

44. The Governor-General in Council may, by notification in the *Gazette of India*, declare that the decrees of any Civil or Revenue Courts situate in the territories of any native Prince or State in alliance with His Majesty and not established or continued by the authority of the Governor-General in Council, or any class of such decrees may be executed in British India as if they had been passed by the Courts of British India.

Execution of decrees passed by Courts of Native States

45. So much of the foregoing sections of this Part as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in British India to send a decree for execution to any Court established or continued by the authority of the Governor-General in Council in the territories of any foreign Prince or State to which the Governor-General in Council has, by notification in the *Gazette of India*, declared this section to apply.

Execution of decrees in foreign territories.

46. (1) Upon the application of the decree-holder the Court which passed the decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.

Precept

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree :

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property.

Attachment under precept.—The object of a precept is to enable a decree-holder to obtain an interim attachment where there is ground to apprehend that he may otherwise be deprived of the fruits of his decree. No such attachment, however, can continue for more than two months except in the two cases mentioned in the section.

The effect of the latter part of the section is to do away with a re-attachment of property attached under a precept where, before the determination of the interim attachment, the decree-holder applies for execution against the property.

**Sec.
46, 47.**

QUESTIONS TO BE DETERMINED BY COURT EXECUTING DECREE.

47. (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

Questions to be determined by the Court executing decree.

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit.

Scope of the section.—This section provides *inter alia* that all questions relating to the execution, discharge or satisfaction of a decree, and arising between the parties to the suit in which the decree was passed, or their representatives, shall be determined by the Court executing the decree and not by a separate suit. This section has been enacted for the beneficial purpose of checking needless litigation. It provides a cheap and expeditious remedy by empowering the Court executing a decree to determine questions that may arise in execution proceedings without requiring the parties to bring a separate suit in respect of every question that may arise between them in such proceedings. Hence this section should not be construed narrowly (1). At the same time the conditions which bar a separate suit should not be lost sight of. Those conditions are two in number, the one relating to the character of the questions in respect of which separate suits are prohibited, and the other to the character of the parties between whom the questions arise. The questions in respect of which a separate suit is barred must be questions "relating to the execution, discharge or satisfaction of the decree." The parties between whom the questions arise must be "the parties to the suit in which the decree was passed, or their representatives." If a question is of the character mentioned above,

(1) *Prasanna Kumar v. Kali Das* (1895) 19 Cal. 683, 689, 10 I. A. 166.

- S. 47. and if it arises between the parties aforesaid, it cannot form the subject of a separate suit: it should be determined by the Court executing the decree on application made by the parties. But if the question is not of the above character, or if it does not arise between the parties aforesaid, it may be determined by a separate suit.

Separate suit will not lie.—When it is said with reference to this section that a separate suit will not lie, it is understood that the question relates to the execution, discharge or satisfaction of the decree, and, further, that it arises between the parties to the suit or their representatives. We proceed to state the leading cases on the subject :—

1. *Claim for excess of property taken in execution of decree.*—If a decree-holder takes in execution land which is not at all covered by the decree, or land which is in excess of the decree, the proper course for the judgment-debtor is to proceed by an application under this section for the recovery of the land in the one case, and the excess in the other, and not by a separate suit (l). The question relates to the execution of the decree, and further, it arises between the parties to the suit.

2. *Restitution of property taken in execution of a decree, when the decree is amended.*—A obtains a preliminary decree against B in a suit for sale of certain property mortgaged to him. On taking accounts it is found that a sum of Rs. 7,000 is due by B to A on the mortgage, and a decree is passed for A for that amount. After the decree has been fully executed, B discovers an error in calculation, and the decree is amended by substituting Rs. 6,000 for Rs. 7,000. B may claim a refund of Rs. 1,000 by an application under this section, but not by a separate suit (m). Similarly, if A discovers an error in calculation after the decree has been executed, and the decree is amended by substituting, say, Rs. 7,500 for Rs. 7,000, A may claim the excess of Rs. 500 by an application under this section, but not by a separate suit (n).

3. *Restitution of property sold in execution, when the sale is set aside.* A obtains a decree against B for Rs. 5,000. B fails to pay the amount of the decree and his property is thereupon sold in execution, and purchased by A, the decree-holder. The sale is set aside on B's application on the ground that the property was purchased by A without the leave of the Court as required by O. 21, r. 72. B may claim restitution of the property by an application under this section, but not by a separate suit (o). See s. 144, sub-s. (2).

Separate suit will lie.—When it is said with reference to this section that a separate suit will lie, it is understood that either the question does not relate to the "execution, discharge or satisfaction" of the decree, or that it does not arise between the parties to the suit or their representatives.

First, where the question does not relate to the execution, discharge or satisfaction of the decree.—In such a case, a separate suit will lie, for the question not being one relating to the execution, discharge or satisfaction of the decree, it cannot be determined in execution proceedings by the Court executing the decree. The following are the leading cases on the subject :—

(1) *Questions as to the validity of a decree.*—If a judgment-debtor or his legal representative objects to the execution of a decree on the ground that the decree is not

(l) *Biru Mahata v. Shyama Churn* (1895) 22 Cal. 483.

(m) *Haryam v. Muhammad* (1905) 27 All. 485;
Dhan Kunwar v. Akhtab Singh (1900) 22 All. 79.

(n) *Nikratan v. Ram Rutton* (1901) 5 C. W. N. 627.

(o) *Viraraghava v. Venkata* (1893) 16 Mad. 287;
Daulat Singh v. Jugat Kishore (1900) 22 All. 108.

valid, the question as to the *validity* of the decree, not being one relating to the "execution, discharge or satisfaction" of the decree, cannot be tried in execution proceedings under this section. Such a question can only be tried in a regular suit brought for the purpose (p). Thus if a judgment-debtor objects to the execution of a decree on the ground that the decree was obtained by fraud, the question of the validity of the decree must be determined by a separate suit (q). The same rule applies where a reversioner objects to the attachment of his reversionary interest, on the ground that the decree obtained against the widow of the last male owner is *not binding* on him, there being no debt due by the last male owner (r).

(2) *Claim for contribution by the judgment-debtor against another.*—A obtains a decree against B and C for Rs. 1,000. A executes the decree against B alone, and B pays the whole amount. B then sues C for contribution. The suit is not barred under this section, for the claim for *contribution* cannot be said to relate to the "execution, discharge or satisfaction" of the decree within the meaning of this section (s). There is no question here between the decree-holder and the judgment-debtor. In fact the remedy by suit is the only remedy.

Secondly, where the question, though relating to the execution, discharge or satisfaction of the decree, does not arise between the parties to the suit or their representatives.—In such a case, the question cannot be determined in execution proceedings under this section, and a regular suit should be brought. A question is said to arise between "the parties to a suit or their representatives," when it arises between the decree-holder or his representative *on the one hand* and the judgment-debtor or his representative *on the other*. Questions between decree-holders *inter se* (t), or between judgment-debtors *inter se* (u), or between a party and his own representative (v), are not questions arising between "the parties to the suit or their representatives," within the meaning of this section.

Sub-section (2).—This sub-section is new. It gives legislative recognition to the practice followed by the Courts under the Code of 1882. It enables the Court to treat an application under this section as a suit or a suit as an application. Hence where a regular suit is instituted for the determination of a question which ought to be determined under this section by the Court executing the decree, the Court in which the suit is brought may either dismiss the suit as barred under this section, or it may in its discretion regard the *plaint* in the suit as an *application* under this section, and dispose of it accordingly, provided the Court in which the suit is brought has jurisdiction to execute the decree (w), and the execution of the decree was not barred at the date of the suit (x).

Parties to the suit—Explanation to the section.—A plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are "parties to the suit" within the meaning of this section.

Illustrations.

(1) A sues B and C. A decree is passed against B, but as against C the suit is dismissed. In execution of the decree against B, certain property is attached as belonging

(p) *Chintaman v. Chintaman* (1898) 22 Bom. 475; *Gomathan v. Komandur* (1904) 27 Mad. 118; *Kumareddi v. Subapathy* (1907) 30 Mad. 20; *Khetrapal v. Sayam* (1904) 32 Cal. 265; *Hira Lal v. Parmeshar* (1899) 21 All. 356.

(q) *Sudindra v. Budan* (1886) 9 Mad. 89; *Dhani Ram v. Luchmeswar* (1896) 23 Cal. 630.

(r) *Tallapragada v. Boorugapalli* (1907) 30 Mad. 402.

(s) *Ram Saran v. Janki* (1899) 18 All. 106.

(t) *Sanjivi v. Ramasami* (1885) 8 Mad. 495; *Ram Chunder v. Hamiran* (1906) 11 O. W. N. 438.

(u) *Pusai v. Mahadeo* (1884) 8 All. 12.

(v) *Maganlal v. Doshi* (1901) 25 Bom. 681.

(w) *Sheddihal v. Bhavani* (1907) 29 All. 348; *Yenakakrishnama v. Krishna Rao* (1900) 32 Mad. 425.

(x) *Satashir v. Narayan* (1911) 35 Bom. 452, 461.

S. 47. to *B*. *C* contends that the property belongs to him and claims to have it released from attachment. Here *C* is a "party to the suit," though the suit has been dismissed against him. He must therefore proceed by an application under this section, and not by a separate suit.

(2) *A* and *B* institute a suit against *C*, praying that the relief claimed in the suit may be granted to *A* or in the alternative to *B*. A decree is passed in the suit awarding the relief claimed to *A*, and dismissing *B*'s claim. Here *B* is a "party to the suit," though his suit has been dismissed.

"Representative."—The term "representative" in this section includes not merely "legal representative" in the sense of heirs, executors or administrators, but "representative in interest," that is, any transferee of the decree-holder's interest, or any transferee of the judgment-debtor's interest, who, so far as such interest is concerned, is bound by the decree (*y*). We proceed to give illustrations:—

(1) A transferee of a decree, or of the interest of any decree-holder in a joint decree within the meaning of O. 21, r. 16, is a "representative" of the decree-holder (*a*). A transferee from such transferee is also a "representative" of the decree-holder (*a*).

(2) A purchaser, lessee, or mortgagee, from a judgment-debtor, of property belonging to the judgment-debtor and attached in execution of a decree against him, is the "representative" of the judgment-debtor within the meaning of this section, for the property being *under attachment* at the date of the purchase, lease or mortgage, the purchaser, lessee or mortgagee is bound by the decree, so far as the interest transferred to him is concerned (*b*). See section 64.

Execution-purchaser.—We now turn to cases where property belonging to a judgment-debtor is sold in execution of the decree against him, and questions relating to the execution, discharge or satisfaction of the decree arise *subsequent to the sale*. These questions may be divided into two classes according to the character of the parties between whom they arise:—

A. Questions between the decree-holder on the one hand and the judgment-debtor on the other, the execution-purchaser being only interested in the result.—These questions being essentially questions *between parties to the suit*, fall within the scope of this section. The fact that the auction-purchaser was not a party to the suit, and is interested in the result, does not prevent the questions being questions *between parties*. These questions therefore must be determined by the Court executing the decree, and not by a separate suit. It has been so held in *Prasunno Kumar v. Kali Das* (*c*), which is the leading case on the subject. In that case their Lordships of the Privy Council said: "When a question has arisen as to the execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser, who is no party to the suit, is interested in the result, has never been held a bar to the application of the section."

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Illustrations.

(a) *A* obtains a decree against *B*. In execution of the decree certain property belonging to *B* is sold and purchased by *C*. *B* seeks to set aside the sale. *B* must proceed by an application and not by a regular suit. The mere fact that *C*, the auction-

(*y*) *Ishan Chunder v. Beni Madhub* (1897) 24 Cal. 62; *Gulzari Lal v. Madha Ram* (1904) 26 All. 447.
(*z*) *Dwar Bakesh v. Fatik* (1890) 26 Cal. 250; *Badri Narain v. Jai Kishan* (1894) 16 All. 483.
(*a*) *Ganga Das v. Yakub Ali* (1900) 27 Cal. 670.

(*b*) *Gur Prasad v. Ram Lal* (1899) 21 All. 24 (sale); *Mathewson v. Gobardhan* (1901) 24 Cal. 492 (lease); *Paramananda v. Mahaboor* (1897) 20 Mad. 378 (mortgage); *Koppun v. Kumara* (1909) 34 Mad. 450 (sale).
(*c*) (1892) 19 Cal. 983, 19 L. A. 160.

purchaser, who was no party to A's suit, is interested in the result of the application, is no bar to the application of this section. Now B may seek to set aside the sale—

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- (i) on the ground of *material irregularity* in publishing or conducting the sale resulting in substantial injury; or
- (ii) on the ground of *fraud* in publishing or conducting the sale resulting in substantial injury; or
- (iii) on making the deposit required by O. 21, r. 89; or
- (iv) on other grounds.

If the sale is sought to be set aside on the first or on the second ground, the application must be made under O. 21, r. 90.

If the sale is sought to be set aside on the third ground, the application must be made under O. 21, r. 89.

If the sale is sought to be set aside on any other ground, the application must be made under the present section.

There is this difference between an application under this section and one under O. 21, rr. 89 and 90, that while an order made on an application under this section has the force of a decree [s. 2, cl. (2)], and is therefore open to a second appeal [s. 100], an order made (under O. 21, r. 92), on an application under O. 21, r. 89 or O. 21, r. 90, is appealable only as an order [O. 49, s. 1, cl. (1)] and no second appeal lies from it [s. 104, sub-s. (2)].

B Questions between the auction-purchaser on the one hand and a party to the suit or his representative on the other hand—Cases under this head frequently arise when the auction-purchaser is obstructed by the judgment-debtor in obtaining possession of the judgment-debtor's property sold in execution of the decree and purchased by him. In cases of this kind, if the property is purchased by a *stranger*, he may apply for possession under O. 21, r. 95, or he may at his option bring a regular suit for possession. But if the property is purchased by the *decree-holder himself*, the question arises whether the provisions of the present section apply so as to bar a regular suit for possession. This again depends on the question whether a decree-holder ceases to be a *party* to the suit within the meaning of this section by reason of his becoming the purchaser at the auction sale, or whether he continues to be a party notwithstanding that he has become the auction-purchaser. If he ceases to be a party to the suit by reason of his becoming the auction-purchaser, the present section does not apply, and he may apply for possession under O. 21, r. 95, or he may at his option bring a regular suit for possession: this is the view held by a Full Bench of the Allahabad High Court (d). But if he is to be treated as a *party* to the suit notwithstanding that he has become the auction-purchaser, he can only proceed by way of *application*, and a regular suit is barred under this section: this is the view held by the other High Courts (c).

Suppose now that the auction-purchaser is a stranger, that is to say, a person other than the decree-holder. Is he the "representative" of the *decree-holder* within the meaning of this section? No (j). Is he the "representative" of the *judgment-debtor*? In some cases it has been said that he is (g); in others, that he is not (h). In *Maganlal*

(d) *Bhagwati v. Banwari Lal* (1909) 31 All. 82.

(e) *Sadashtv v. Narayan* (1911) 35 Bom. 452; *Ram Narain v. Banat* (1904) 31 Cal. 737; *Kallayat v. Ramon* (1903) 26 Mad. 740.

(f) *Krishna v. Sarasvata* (1908) 31 Mad. 177; *Nadammuni v. Veerabhadra* (1910) 34 Mad. 417; *Anandi Kunwari v. Ajudhia Nath*

(1908) 30 All. 379, 384.

(g) *Kasinatha v. Uthamasa* (1902) 25 Mad. 529, 532; *Anandi Kunwari v. Ajudhia Nath* (1908) 30 All. 379, 383.

(h) *Nadammuni v. Veerabhadra* (1910) 34 Mad. 417, 421.

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v. *Doshi Mulji* (i). Jenkins, C.J., said: "Can it be said that the auction-purchaser is the *representative* of a party? Certainly not of the decree-holder. Therefore he can only claim to be the representative of the judgment-debtor. I doubt whether he can claim this character."

Sub-sec. (3): Inquiry as to who is the representative of a party.—A obtains a decree against *B*. *B* dies before the decree is fully executed, and *C* is brought on the record as *B*'s legal representative under s. 50. *D* claims to be the legal representative of *B*. The question as to which of the two is the legal representative for the purposes of the present section is to be determined by the Court executing the decree under this section and not by a separate suit.

Objection by party or his representative that property attached is not liable to attachment.—All objections to attachment raised by a *party to the suit* in which the decree was passed or his *representative* come under this section. But objections to attachment raised by a *third party* come under O. 21, r. 58. The distinction is important, for an order under this section, being a "decree" (s. 2), is appealable. While an order under O. 21, r. 58, is not appealable. Moreover, if the objection falls under this section, a separate suit is barred, but it is not barred if the objection falls under O. 21, r. 58. If the property in the hands of a judgment-debtor is attached, and the judgment-debtor objects to the attachment on the ground that the property is not "saleable" within the meaning of s. 60, and should not therefore be attached, as where it is service vatan or an occupancy holding, the objection is one under this section, for it is made by a *party to the suit* (j). But if the judgment-debtor objects to the attachment on the ground that he holds it *on behalf of a third party*, e.g.: as a trustee for another, the objection comes under O. 21, r. 58 (k). Conformably to this principle where property is attached in execution of a decree passed against a *shc bail* personally, and the defendant objects that the property does not belong to him personally, but that it is held by him *as shc bail of an idol*, it has been held that the objection must be regarded as one falling under O. 21, r. 58, and not under this section (l).

As regards objections to attachment by the *legal representative* of a deceased judgment-debtor, it has been held that if property in the hands of a legal representative is attached, and the legal representative objects to the attachment on the ground that the property attached is *his own* property, and does not form part of the estate of the deceased judgment-debtor, the objection is one under this section, for it is made by a *representative of a party to the suit* (m). But if the legal representative objects to the attachment on the ground that he holds the property *on behalf of a third party*, the objection is one under O. 21, r. 58 (n).

Where a sale is sought to be set aside on the ground that the decree was obtained by fraud.—It has been stated above that where a *sale* is sought to be set aside on the ground of fraud in publishing or conducting it, the parties must proceed by an application under O. 21, r. 90, and not by a separate suit. A suit, however, will lie to set aside a sale, if the *decree* which resulted in the sale was obtained by fraud.

Appeal.—On referring to the definition of "decree given in s. 2 above, it will be seen that an order determining any question within this section is a "decree." Hence

(i) (1901) 25 Bom. 631, 635.

(j) *Trimbak v. Gorinda* (1895) 19 Bom. 328;

Gahar v. Kari (1900) 27 Cal. 415.

(k) *Budrudeen v. Abdul Rahim* (1908) 31 Mad. 125.

(l) *Kartick Chandra v. Ashutosh* (1911) 39 Cal.

298.

(m) *Gokulsing v. Kisanasingh* (1910) 31 Bom. 546;

Dulla v. Shih Lal (1917) 39 All. 47.

(n) *Budrudeen Sahib v. Abdul Rahim* (1908) 31 Mad. 125.

an appeal lies from all orders under this section and also a second appeal (s. 100). It is important to note that *all* orders in execution proceedings are *not* appealable. As regards appeal, orders in execution proceedings may be divided into two classes :—

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- (1) Orders under this section. [An appeal lies from these orders and also a second appeal.]
- (2) Other orders in execution proceedings. These may again be sub-divided into two classes :
 - (a) those which are declared appealable under s. 104 and O. 43, r. 1 : and
 - (b) those which are non-appealable.

Where an order is made in execution proceedings, and the order is non-appealable, attempts are frequently made by the party against whom the order is made to show that the order comes under this section and is therefore appealable. Similarly, where an order is made in execution proceedings, and the order is appealable under s. 104, attempts are frequently made by the party against whom the order in appeal is made to show that the order comes under this section to enable the party to prefer a second appeal. It will thus be seen that this section is important not only as regards the question whether a *separate suit* will lie, but also as regards the question of *appeal*.

An order in execution proceedings can fall under this section only when it determines some question relating to the *rights and liabilities* of parties with reference to the relief granted by the decree ; not when it determines merely an *incidental question* as to whether the proceedings are to be conducted in a certain way (c).

LIMIT OF TIME FOR EXECUTION.

48. (1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from

Execution barred in certain cases.

- (a) the date of the decree sought to be executed, or,
- (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

(2) Nothing in this section shall be deemed—

- (a) to preclude the Court from ordering the execution of a decree upon an application presented after

(a) *Togodishary v. Kailash* (1897) 24 Cal. 725, 739 ; *Mukhtar v. Mugarab* (1912) 34 All. 530.

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the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force prevented the execution of the decree at some time within twelve years immediately before the date of the application : or

- (b) to limit or otherwise affect the operation of article 180 of the second schedule to the Indian Limitation Act, 1877.

Successive applications for execution of decrees of Courts other than Chartered High Courts.—What is stated in this paragraph is confined to applications for execution of decrees of Courts other than Chartered High Courts. A decree holder is entitled to present in succession *any number* of applications for execution of the same decree (p), and the Court has no power to refuse execution, unless—

- (i) the application is barred by virtue of general principles of law analogous to those of *res judicata* : or
- (ii) the application is barred under art. 182 of the Limitation Act, 1908 : or
- (iii) the execution of the decree is barred under sub-section (1) of the present section though the application for execution may not be barred under clause (i) or cl. (ii).

Clause (i).—Thus if the first application for execution is dismissed after a hearing on the merits, the Court will not, having regard to the general principles of law analogous to those of *res judicata*, entertain a subsequent application for execution of the same decree (q).

Clause (ii).—Though an application for execution may not be barred as *res judicata*, the Court will not entertain it, if it is barred under art. 182 of the Limitation Act, 1908. Leaving out of consideration certain portions of that article, the rule of limitation set forth in that article may be stated thus : the first application for execution must be made within three years from the date of decree sought to be executed, and every successive application for execution of the same decree must be made within three years from the date of the last application. By this process a decree may be kept alive for any number of years. To this a limit has been set by the rule contained in the present section which is considered in the next clause.

Clause (iii).—Though an application for execution of a decree may not be barred as *res judicata* or under art. 182 of the Limitation Act, 1908, no order should be made for execution of the decree, if the application is *presented* after the expiration of twelve years (1) from the date of the decree, or (2) from the date fixed by the decree for the payment of money or for the delivery of any property under the decree. A obtains a decree against B for Rs. 1,000 on 1st January 1894, and applies for execution of the decree within three years from the date of the decree. Further applications are made for execution of the same decree each within a period of three years from the date of the next preceding application, and the last of these is made in December 1905. A then makes a fresh application for execution on 1st January 1907. No order should be made for execution

(p) *Thakur Prasad v. Fakirullah* (1895) 17 All. 106, 111-112, 22 I. A. 44. See also O. 21, r. 11, and Limitation Act, art. 182, cl. (4).
(q) See *Dhenkal v. Phakkar* (1893) 15 All. 84.

of the decree, for though the application is not barred under the Limitation Act, it is barred under this section as it is made twelve years after the date of the decree. Note carefully that the limit of time prescribed by this section does not apply to a decree granting an *injunction* [see the 2nd line of the section].

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Where payment is directed to be made "at a certain date."—If, in the case put above, the decree had directed payment of Rs. 5,000 to be made *at a certain date*, for instance, 1st March 1894, the period of twelve years would run from that date. [sub-s. (1), cl. (b)].

Where payment is directed to be made "at recurring periods."—Thus if a decree, dated 1st January 1903, directs payments to be made *annually*, but no dates are specified, the first yearly payment will fall due on 1st January 1904, the second on 1st January 1905, and thenceforward on the corresponding date year after year. Hence the period of twelve years prescribed by this section will run, as regards the application to enforce the first yearly payment, from 1st January 1904, as regards the application to enforce the second yearly payment, from 1st January 1905, and so forth [sub-s. (1), cl. (b)].

Successive applications for execution of decrees of Chartered High Courts.—The holder of a decree of a Chartered High Court passed in the exercise of its ordinary original civil jurisdiction is entitled to present in succession *any number* of applications for execution of the decree, and the Court is bound to entertain them, unless the application is barred—

- (i) by virtue of general principles of law analogous to those of *res judicata*; or
- (ii) under art. 183 of the Limitation Act, 1908 [art. 180 of the Limitation Act, 1877], that being the article which applies to decrees of Chartered High Courts.

It will be observed that cl. (iii) which occurs in the preceding paragraph does not occur here. The reason is that the twelve years' rule laid down in this section does not limit or otherwise affect the operation of art. 183 as it does that of art. 182. In other words, the said rule does not apply to decrees passed by Chartered High Courts [sub-s. (2), cl. (b)].

Hence a decree of a Chartered High Court may be kept alive for *any* number of years. The same rule applies to Orders in Council made on appeal to the Privy Council (r).

Date of decree sought to be executed.—The rule of law is that it is only the final decree that can be executed. Hence if the decree sought to be executed is a decree of a Court of first instance, the period of twelve years prescribed by this section runs from the date of that decree. And if the decree sought to be executed is an appellate decree, that period runs from the date of the *appellate decree*, whether the original decree is affirmed, or set aside or modified, on appeal (s).

Fraud.—"Fraud" or "force" on the part of a judgment-debtor at any stage of the execution gives a new starting point for the period of limitation (t). Looking up the house so as to prevent attachment of moveable property (u), or evading arrest by any contrivance, or dishonestly evading payment by eluding service of warrant (v), is "fraud" within the meaning of this section. It is doubtful whether the fraud of one of several judgment-debtors keeps the decree alive against the judgment-debtors (w).

(r) *Futteh Narain v. Chundrabati* (1899) 20 Cal. 551.

(s) *Mahomed Mehdi v. Mohini Kant* (1907) 31 Cal. 874.

(t) *Venkayya v. Raghava* (1899) 22 Mad. 320; *Mohsin Ali v. Masum Ali* (1911) 34 All. 20.

(u) *Bhagu v. Bawasahab* (1885) 9 Bom. 318; *Venkayya v. Raghava* (1899) 22 Mad. 320.

(v) *Abdul Khadir v. Ahmmad* (1911) 35 Mad. 670.

(w) *Abdul Khadir v. Ahmmad* (1911) 35 Mad. 670.

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TRANSFEREES AND LEGAL REPRESENTATIVES.

49. Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder.

Transferee.

Equity of judgment-debtor.—If the judgment-debtor has the right or equity to set off his cross-decree against the transferor under o. 21, r. 13, the transferee will hold the decree subject to that right or equity.

Illustration.

A holds a decree against B for Rs. 5,000. B holds a decree against A for Rs. 3,000. A transfers his decree to C. C cannot execute the decree against B for more than Rs. 2,000 : *Kaim Ali v. Lakhikant* (1868) 1 B. L. R., F. B. 23.

50. (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

Legal representative.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

Extent of liability of legal representative.—This section enables a decree-holder to execute his decree against the legal representative of a deceased judgment-debtor. The liability of a legal representative in *execution proceedings* is confined to the property of the deceased which *has actually come to his hands*. If the decree-holder seeks to make the legal representative answerable also for the property of the deceased which *would have come to his hands* had he exercised due diligence his proper remedy is by way of *suit* against the legal representative and not by execution proceedings under this section (x).

Legal representative.—“Legal representative” means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased [s. 2, cl. (11)]. Thus, where a judgment-debtor dies, and a stranger takes possession of his property, the decree may be executed against the stranger, for he is a “legal representative” within the meaning of this section. The

(x) *Khusroobhai v. Dhanu Sha* (1887) 11 Bom. 717; *Saratmani Dobi v. Datta Keshav* (1905) 12 Cal. W. N. 111.

purchaser of the business of a firm against which a decree has been passed is not the "legal representative" of the firm within the meaning of this section. The decree against the firm cannot therefore be executed against the purchaser (y).

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"May apply to execute the decree against the legal representative."

This does not mean that when a judgment-debtor dies after execution proceedings have been commenced against him, the decree-holder must present a fresh application for execution against his legal representative under the provisions of O. 21, r. 11. All that is necessary is to apply to the Court which passed the decree for liberty to continue the execution proceedings against the legal representative by substituting the name of the legal representative in the place of that of the judgment-debtor in the application for execution already on the files of the Court (z). See O. 21, r. 22.

Decree for injunction.—An injunction obtained against a defendant restraining the latter from obstructing the access of light and air to certain windows may, on the death of the defendant, be enforced under this section against his son as his legal representative by procedure under O. 21, r. 32 (a). But such an injunction cannot be enforced against a purchaser of the property from the defendant, for an injunction does not run with the land. As against a purchaser, the only remedy of the decree-holder is to institute a fresh suit for an injunction (b).

PROCEDURE IN EXECUTION.

51. Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree—

Powers of Court to enforce execution.

- (a) by delivery of any property specifically decreed ;
- (b) by attachment and sale or by sale without attachment of any property ;
- (c) by arrest and detention in prison ;
- (d) by appointing a receiver ; or
- (e) in such other manner as the nature of the relief granted may require.

Receiver in execution proceedings.—A receiver may be appointed to realize a decree attached in execution proceedings. A obtains a decree against B. In execution of the decree A attaches a decree held by B against C (O. 21, r. 53). The Court may appoint a receiver to realize the decree attached, if this course is likely to benefit the parties more than the sale of the attached decree (c). Similarly, a receiver may be appointed to realize a debt attached in execution of a decree (d). But the Court has no

(y) *Harish Chandra v. Chandpur Co., Ltd.* (1903) 30 Cal. 961; *Arbuthnot's Industries, Ltd. v. Mutha Chettiar* (1908) 31 Mad. 461.
(z) *Parashottam v. Ramesh* (1909) 31 Bom. 112.
(a) *Sakralal v. Purattalal* (1902) 26 Bom. 253.

(b) *Dahyabhai v. Bapalal* (1902) 26 Bom. 140.
(c) *Parab Singh v. Delhi and London Bank* (1908) 30 All. 393.
(d) *Toolsu v. Adone* (1887) 11 Bom. 448.

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jurisdiction to appoint a receiver of the *future* earnings of the judgment-debtor (c). Nor has it jurisdiction to appoint a receiver to collect the future allowances of maintenance as the right to future maintenance is not attachable and saleable under s. 62, cl. (n) (f).

52. (1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

Enforcement of decree
against legal representative.

(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally.

Scope of the section.—Section 50 provides for the case where a decree has been passed *against a party* and the party dies before the decree is fully satisfied, and the decree is sought to be executed against his legal representative. The present section provides for the case where the *decree* is passed *against the legal representative* of a deceased person. As to the latter case it is provided by this section, that if the decree is for the payment of money out of the property of the deceased, the decree may be executed *against the property of the deceased* in the hands of the legal representative. But in so far as the property of the deceased come into the hands of the legal representative has not been *duly* applied by him, the decree may be executed *against the legal representative* as if the decree was to that extent passed against him *personally*. In other words, the legal representative can be proceeded against *personally* to the extent to which he has failed to apply the assets *duly*.

53. For the purposes of section 50 and section 52, property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

Liability of ancestral property.

Liability of ancestral property in execution proceedings.—This section is new. It settles a question of procedure on which there was a conflict of judicial decisions. To understand the precise scope of the section, it is necessary to bear in mind the rule

(c) *Holmes v. Millage* [1893] 1 Q. B. 551.

(f) *Polikandy v. Krishnan* (1917) 40 Mad. 302.

of Hindu law that where a son or grandson takes any ancestral property by survivorship, he is bound to pay out of such property all debts of his ancestor not incurred for immoral or illegal purposes, including judgment-debts. The question we are now concerned with is—by what *procedure* is the liability to be enforced? We proceed to consider the subject under the following two heads:—

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1. *Where a money-decree has been passed against the father, and the father dies before the decree has been fully satisfied.*—*A* and his sons *B* & *C* constitute a joint Hindu family owning ancestral property. *D* obtains a decree against *A* for Rs. 5,000. *A* dies, and on his death *B* and *C* take the ancestral property by survivorship. *A* does not leave any self-acquired property. Here *D* should first proceed to bring *B* and *C* on the record as the legal representatives of *A* under s. 50, and then apply under that section to the Court which passed the decree to execute the same against *B* and *C* to the extent of the ancestral property come to their hands. The words in s. 50 are, “to the extent of the *property of the deceased* which has come to his [legal representative’s] hands.” According to the present section, the ancestral property in the hands of *B* and *C* being liable under Hindu law for the payment of *A*’s debts, it is to be deemed, for the purposes of s. 50, to be the *property of the deceased* which has come to the hands of *B* and *C* as the legal representatives of *A*. If *B* and *C* object that the debt in respect of which the decree was passed was tainted with immorality, the question is one “relating to the execution of the decree” within the meaning of s. 47, and it should be determined by the Court executing the decree.

2. *Where a decree has been passed against the sons in respect of their father’s debt for payment of the debt out of the ancestral property.*—In such a case, the decree-holder may proceed to execute the decree by attachment and sale of the ancestral property come to the hands of the sons. The proceedings would lie under s. 52. The expression “property of the deceased” in that section would be construed in the light of the present section. In fact, s. 53 is an *Explanation* to ss. 50 and 52, explaining the meaning of the expression “property of the deceased.”

54. Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates.

Partition of estate or separation of share,

Partition by Collector.—Where a decree has been passed for partition or for separate possession of a share of an estate assessed to the payment of revenue to Government, the proper authority to effect the partition or to deliver possession of the share is the Collector; the Court has no power to do so (g). It has been held that the section applies only to cases where as the result of partition the revenue would or might be affected, and not to cases where no separate allotment of revenue is asked for (h).

(g) *Dattatraya v. Mahadeji* (1892) 16 Bom. 528.

(h) *Jagdishchuri v. Kailash Chandra* (1897) 24 Cal. 725.

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ARREST AND DETENTION.

55. (1) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall as soon as practicable, be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the Local Government may appoint for the detention of persons ordered by the Courts of such district to be detained :

Arrest and detention

Provided, firstly, that, for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise :

Provided, secondly, that no outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found

Provided, thirdly, that, if the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officers authorised to make the arrest shall give notice to her that she is at liberty to withdraw, and after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest :

Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) The Local Government may, by notification in the local official Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience

to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the Local Government in this behalf.

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55, 56.

(3) Where a judgment-debtor is arrested in execution of a decree for the payment of the money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he will be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

(4) Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court shall release him from arrest, and, if he fail so to apply and to appear, the Court may either direct the security to be realized or commit him to civil prison in execution of the decree.

Breaking open of outer door.—Under the Code of 1882, the breaking open of an outer door of a dwelling-house was strictly prohibited. This prohibition has now been removed to this extent that where a dwelling-house is in the occupancy of the judgment-debtor, and he refuses or prevents access thereto, the officer authorized to make the arrest may break open any outer door of such dwelling-house. But this does not authorize him to break open an outer door of a dwelling-house, merely because the judgment-debtor is to be found in that house. The prohibition above referred to as well as the prohibition against entering a dwelling-house after sunset for effecting an arrest are to be traced to the maxim of English law that "a man's house is his castle." Referring to this maxim, Bentham wrote more than a century ago: "This poetical expression is certainly no reason: for if a man's house be his castle by night, why not by day? The course of justice is sometimes interrupted in England by this puerile notion of liberty" (i).

Sub-section (2).—This sub-section is intended to cover the cases of certain persons or classes of persons whose summary arrest might, as in the case of railway servants, be attended with danger or inconvenience to the public.

56. Notwithstanding anything in this Part, the Court shall not order the arrest or detention in the civil prison of a woman in execution of a decree for the payment of money.

Prohibition of arrest or detention of women in execution of decree for money.

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Security for costs.—This section provides that a woman shall not be arrested in execution of a decree for the payment of money. With this immunity from arrest, however, there is coupled a burden, namely, that she may be required to give security for the defendant's costs where the suit is for the payment of money. See O. 25, r. 1.

57. The Local Government may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtors.

58. (1) Every person detained in the civil prison in execution of a decree shall be so detained,—

(a) where the decree is for the payment of a sum of money exceeding fifty rupees for a period of six months, and,

(b) in any other case, for a period of six weeks :

Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be,—

- (i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or
- (ii) on the decree against him being otherwise fully satisfied, or
- (iii) on the request of the person on whose application he has been so detained, or
- (iv) on the omission by the person, on whose application he has been so detained, to pay subsistence allowance :

Provided, also, that he shall not be released from such detention under clause (ii) or clause (iii) without the order of the Court.

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be

re-arrested under the decree in execution of which he was detained in the civil prison.

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Re-arrest.—The immunity of a judgment-debtor from a second arrest depends, not only upon his having been *arrested*, but upon his having been *detained in jail* under the arrest. Thus where a judgment-debtor, while acting as a pleader in Court, was arrested and *discharged* on the ground that he was exempt from arrest under s. 642 of the Code of 1882 (now s. 135), it was held that he was liable to be re-arrested in execution of the same decree against him (j). Similarly, where a judgment-debtor was arrested, but was *liberated* owing to non-payment of subsistence money, it was held that he was liable to be re-arrested in execution of the same decree (k). To use the language of sub-section (2), the judgment-debtor was not in either case released from detention so as to prevent his re-arrest.

59. (1) At any time after a warrant for the arrest of a judgment-debtor has been issued the Court may cancel it on the ground of his serious illness.

(2) Where a judgment-debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to be detained in the civil prison.

(3) Where a judgment-debtor has been committed to the civil prison, he may be released therefrom—

(a) by the Local Government, on the ground of the existence of any infectious or contagious disease, or

(b) by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness.

(4) A judgment-debtor released under this section may be re-arrested, but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by section 58.

ATTACHMENT.

60. (1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, banknotes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation

Property liable to attachment and sale in execution of decree.

(j) *Rajendra v. Chunder Mohun* (1896) 23 Cal. 188. | (k) *Habibul-Ruhman v. Ram Sahai* (1904) 26 All. 317.

S. 60 and, save as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf :

Provided that the following particulars shall not be liable to such attachment or sale, namely :—

- (a) the necessary wearing-apparel, cooking vessels, beds and bedding of the judgment-debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman :
- (b) tools of artisans, and where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section :
- (c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him :
- (d) books of account :
- (e) a mere right to sue for damages ;
- (f) any right of personal service ;
- (g) stipends and gratuities allowed to pensioners of the Government, or payable out of any service family pension fund notified in the *Gazette of India* by the Governor-General in Council in this behalf, and political pensions :
- (h) allowances (being less than salary) of any public officer or of any servant of a railway company or local authority while absent from duty ;

- (i) the salary or allowances equal to salary of any such public officer or servant as is referred to in clause (h), while on duty, to the extent of—
- (i) the whole of the salary, where the salary does not exceed twenty rupees monthly ;
 - (ii) twenty rupees monthly, where the salary exceeds twenty rupees and does not exceed forty rupees monthly ; and
 - (iii) one moiety of the salary in any other case ;
- (j) the pay and allowances of persons to whom the Indian Articles of War apply :
- (k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1897, for the time being applies in so far as they are declared by the said Act not to be liable to attachment :
- (l) the wages of labourers and domestic servants whether payable in money or in kind :
- (m) an expectancy of succession by survivorship or other merely contingent or possible right or interest ;
- (n) a right to future maintenance :
- (o) any allowance declared by any law passed under the Indian Councils Acts, 1861 and 1892, to be exempt from liability to attachment or sale in execution of a decree ; and.
- (p) where the judgment-debtor is a person liable for the payment of land-revenue, any moveable property which, under any law for the time being applicable to him, is exempt from sale for the recovery of an arrear of such revenue.

Explanation.— The particulars mentioned in clauses (g), (h), (i), (j), (l) and (o) are exempt from attachment or sale whether before or after they are actually payable.

(2) Nothing in this section shall be deemed to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and

- S. 60. necessary for their enjoyment) from attachment or sale in execution of decrees for rent of any such house, building, site or land.

Saleable property.—Subject to the proviso to sub-section (1), all saleable property which belongs to the judgment-debtor may be attached and sold in execution of a decree against him. The *equity of redemption* of a mortgagor in mortgaged property is “saleable property” within the meaning of this section, and is therefore liable to be attached and sold in execution of a decree against him (l). The *share of a partner* in a partnership business is “saleable property,” and can be attached and sold in execution of a decree obtained against him by his creditor [O. 21, r. 40]. The *right to claim specific performance* of a contract to sell land is also attachable and saleable (m). A *life-interest* in trust funds is attachable and saleable in execution of a decree against the life-tenant (n). Similarly, a *vested remainder* may be attached and sold in execution of a decree against the remainderman (o).

Money or other valuable securities deposited as *security for the due performance of duty by a servant* with his master *may be attached* in execution of a decree against the servant, but the attachment will be subject to the lien which the master has upon the deposit, and the deposit *cannot be sold until* the same is at the disposal of the servant free from the lien of the master at the expiration of the period of employment (p).

A religious office is not saleable property (q). Similarly, the right of managing a temple, of officiating at the worship conducted in it, and of receiving the offerings at the shrine, is not saleable (r).

Disposing power.—A property may not belong to a judgment-debtor, and yet he may have a *disposing power* over it exercisable *for his own benefit*. In such a case also the property is liable to attachment and sale subject to the proviso to this section. The trustees of a religious endowment have no disposing power over the *corpus* of the trust estate exercisable for their own benefit; hence the *corpus* cannot be attached (s).

A bonus sanctioned by a Railway Company to its servant is virtually a gift which must be completed either by a registered document or by actual payment as required by s. 123 of the Transfer of Property Act. A Railway Company sanctioned a bonus to A, and the amount was forwarded to the District Paymaster of the Company for payment to A. Before the amount was paid to A, it was attached by a creditor of A in the hands of the Paymaster. Held that the amount could not be attached, for the gift was not complete, and A had therefore *no disposing power* over the money (t).

A sends a cover containing currency notes to the Post Office for delivery to B, the addressee. Can the cover be attached, while it is yet in the Post Office, by a creditor of B? It has been held that it can be attached, on the ground that the cover is *in the disposing power of B*. “When once the letter has been posted, the property in it becomes vested in the addressee” (u).

An auctioneer has no disposing power over the whole of the sale proceeds of goods sold by him as such, but only over that portion of it which represents his commission.

(l) *Parashram v. Goriud* (1897) 21 Bom. 22b.

(m) *Rudra v. Krishna* (1887) 14 Cal. 241.

(n) *Abdul Lateef v. Doutre* (1889) 12 Mad. 250.

(o) *Annaji v. Chandrabai* (1893) 17 Bom. 503.

(p) *Karulkar v. Subramanya* (1886) 9 Mad. 203.

(q) *Rangasami v. Ranga* (1893) 16 Mad. 140.

(r) *Rajah Vurmah v. Razi Vurmah* (1876) 1 Mad.

235, 4 I. A. 76; *Gnanasambanda Pandara Sannadhi v. Velu Pandaram* (1900) 23 Mad.

271, 27 I. A. 60.

(s) *Bishen Chand v. Nadir Hossain* (1886) 15 Cal. 329, 15 I. A. 1.

(t) *Janaki Das v. East India Ry.* (1884) 6 All. 634.

(u) *Narasimhulu v. Adappa* (1890) 13 Mad. 242.

Hence the whole of the sale proceeds in the hands of an auctioneer cannot be attached in execution of a decree against him, but only that much of it which represents his commission (v).

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Where a married person effects a policy on his own life, and the policy is expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, then, in cases to which the Married Women's Property Act, 1874, applies, the simple declaration on the face of the policy that the policy is for the benefit of his wife or children amounts to a trust for them, and the policy cannot be attached by his creditors but in cases to which the said Act does not apply such a declaration is not sufficient to create a trust, and the insured has a disposing power over the policy for his own benefit, and the policy may be attached by his creditors, unless it has been assigned as provided by s. 130 of the Transfer of Property Act, 1882, or a trust has been declared in respect thereof as provided by s. 5 of the Indian Trusts Act, 1882. In this connection it may be observed that there is a conflict of decisions as to whether s. 6 of the Married Women's Property Act, which provides for insurance by a married man for the benefit of his wife and children, applies to Hindus. It has been held by a Full Bench of the High Court of Madras that it does (w); by the High Court of Bombay, that it does not (x).

Debts.—Debts are expressly mentioned in the section, and they are liable to attachment and sale. A debt is an obligation to pay a liquidated (or specified) sum of money. Money that has not yet become due does not constitute a debt, for there is no obligation to pay that which has not yet become due. The word "debt" in this section means an actually existing debt, that is, a perfected and absolute debt. A sum of money which might or might not become due on the payment of which depends upon contingencies which may or may not happen is not a "debt" (y). A money-claim that has already become due is a debt, and it may be attached as such, though it may be payable at a future day; but a money-claim *accruing due* is not a debt and cannot be attached. *The attachment must operate at the time when it is made and not be anticipatory so as to fasten on a claim that may ripen into a debt at some future time (z).*

Illustrations.

1. A delivers goods to his agent, B, for sale. B sells the goods, and receives the sale proceeds. The sale proceeds in the hands of B constitute a "debt" due to A, and they may therefore be attached while in B's hands in execution of a decree against A; *Madho Das v. Ramji* (1894) 16 All. 286.

2. Maintenance allowance that has already become due, *private* pensions that have already become due, and the wages of *private* servants that have already become due, are "debts" within the meaning of this section: *Kasheeshuree v. Gresh Chunder* (1866) 6 W. R., Mis. 64 (maintenance); *Bhogrub v. Madhub Chunder* (1880) 6 C. L. R. 19 (private pensions); *Ayyaravayyar v. Virasami* (1898) 21 Mad. 393; *Devi Prasad v. Lewis* (1908) 31 All. 304 (wages of private servants).

As to the mode in which a debt may be attached, see O. 21, r. 46.

Clause (c): houses occupied by agriculturists.—The term "agriculturists" includes not only persons who cultivate land in which they have an interest either as proprietor or tenant, but persons engaged in the cultivation of land for remuneration

(v) *Smith v. Allahabad Bank* (1901) 23 All. 135.
(w) *Balamba v. Krishnappa* (1913) 37 Mad. 483
[F. B.].

(x) *Shankar v. Umabai* (1911) 37 Bom. 471

(y) *Haridas v. Barda Kishore* (1906) 27 Cal. 38.
(z) *Syed Tufsozzul v. Rughoonath* (1871) 14 M. L. A. 40, 50; *Sher Singh v. Sri Ram* (1908) 30 All. 246.

- S. 60.** although they may have no interest in the land either as proprietor or tenant (a), cl. (c) provides that houses belonging to an agriculturist and occupied by him are not liable to attachment. But if a house occupied by an agriculturist is *specifically mortgaged*, it is not protected from sale in execution of a decree upon the mortgage. Clause (c) does not prohibit the sale of property *specifically mortgaged*, though it may be occupied by an agriculturist as such, unless he is prohibited by law from mortgaging or selling it (b).

Political pensions.—All pensions of a political nature payable directly by the Government of India are political pensions (c). Arrears of political pension due to a pensioner and lying in the hands of the Government at the time of his death do not lose their character of political pension by reason merely of the pensioner's death. The character of the fund remains unchanged so long as it remains unpaid in the hands of the Government, and it is not liable to attachment in the hands of the Government in execution of a decree against the deceased. But once the fund has passed out of the hands of the Government into the hands of the legal representative of the deceased, it becomes part of the estate of the deceased, and may therefore be attached (d).

Private pensions.—Private pensions, as distinguished from Government pensions, are not exempt from attachment, and they may be attached either as "debts" or as "property belonging to the judgment-debtor" within the meaning of this section. But they neither constitute "debts" nor "property belonging to the judgment-debtor" until they have become due and payable. Hence they cannot be attached *before* they have become due and payable. Pensions granted by Railway Companies to their servants are private pensions (e).

Clause (h): allowances, being less than salary, of a public officer while absent from duty.—Thus where an officer is on sick leave on *half pay*, the whole of the half pay is exempt from attachment.

Clause (i): salary of public officer while on duty.—The salary of a public officer can be attached only *partially*, except where it does not exceed Rs. 20 monthly, in which case the *whole* of it is exempt from attachment. The object of the exemption is to enable public officers to maintain themselves and their families in a position suitable to their rank. This exemption did not occur in the Code of 1859; hence the salary of a public officer and of the other persons mentioned in this clause was attachable to the extent of the whole as a "debt." And since it could only be attached as a "debt," it was not attachable until it had *become due* (f). Under the Codes of 1877 and 1882, and under the present Code, the salary, to the extent to which it is attachable, may be attached *in advance* (g).

The pay of an officer of the Indian Army is liable to attachment under this clause (h). It was at one time doubtful whether the pay of such an officer was liable to be attached, having regard to a clause at the end of this section by which it was provided that "nothing in this section shall be deemed to affect the provisions of the Army Act or of any similar law for the time being in force." But that clause was repealed by the Repealing and Amending Act 10 of 1914, and the doubt referred to above has so far been removed.

(a) *Devare v. Vaikant* (1917) 41 Bom. 475.

(b) *Bhagandas v. Hathibhai* (1880) 4 Bom. 25;

Bholu Nath v. Kishori (1911) 34 All. 25.

(c) *Bishambar v. Imdad Ali* (1891) 18 Cal. 216, 17 I. A. 181.

(d) *Valia v. Anupuri* (1903) 26 Mad. 69.

(e) *Bhojrab v. Madhub Chunder* (1880) 6 C. L. R. 19.

(f) *Tejram v. Kuna ji* (1870) 7 B. H. C. A. C. 110.

(g) *Beard v. Samuel* (1883) 4 Mad. 179.

(h) *Hay v. Ramchunder* (1917) 39 All. 305.

Salary of a private servant.—The salary of a private servant can be attached only as a "debt;" hence it cannot be attached *before* it has become due (i). S. 60.

Clause (k) : compulsory deposits.—The expression "compulsory deposit" is defined in s. 2 of the Provident Funds Act IX of 1897 as a subscription or deposit which is not repayable on the demand or at the option of the subscriber or depositor, and includes any contribution which may have been credited in respect of any interest or increment which may have accrued on such subscription or deposit under the rule of the Funds.

Compulsory deposits made by railway servants towards the Provident Fund under the Provident Funds Act are not liable to attachment so long as they retain the character of compulsory deposit. A deposit which, when it was made, was a "compulsory deposit," continues to retain that character *so long as it remains in the hands of the Railway Company*. It does not lose that character, though the employee may have ceased to be in the service of the Company by retirement, resignation or dismissal, and may have become entitled in that event to be paid the amount due to his credit in the Provident Fund. But once it is *paid out* by the Company on the happening of any of the above events, it loses the character of "compulsory deposit," and it may be attached in the hands of the party to whom it has been paid (j).

Clause (l) : wages of labourers.—A "labourer" is a person who earns his daily bread by personal manual labour, or in occupations which require little or no art, skill or previous education. Thus persons who agree to spin cotton and to receive a certain amount of money for a certain quantity of cotton spun by them are labourers, and their wages cannot be attached (k).

Clause (m) : expectancy of succession, etc.—The interest which a Hindu reversioner has in the immovable property of a deceased Hindu on the death of the deceased's widow is "an expectancy of succession by survivorship;" in other words, it is an interest *expectant* on the widow's death to which the reversioner could only succeed if he *survived* the widow (l). Hence it cannot be attached.

Clause (n) : right to future maintenance.—If A is entitled to a monthly maintenance under a deed, the allowance could only be attached after it has become due (m). It cannot be attached prospectively, that is, before it has become due (n). In other words *claims* of maintenance may be attached, but not the right to *future* maintenance.

Objection to attachment on the ground that the property is not saleable, when to be raised.—A obtains a decree against B, and applies for execution of the decree by attachment and sale of certain property belonging to B. The property is attached and sold, and purchased by C. B then applies to the Court to set aside the sale on the ground that the property was not liable to attachment and sale. Can the application be entertained? It has been held that if B was a party to the order for sale or was aware of it and did not appeal against it, he would be precluded from questioning the propriety of the order *after* the sale, and he cannot therefore impeach the sale that

(i) *Ayyaragayyar v. Virasami* (1898) 21 Mad. 393; *Devi Prasad v. Lewis* (1909) 31 All. 304.

(j) *Verechand v. B. B. & C. I. Railway* (1904) 6 Bom. L. R. 921; *Sett Munna Lal v. Gainford* (1908) 38 Cal. 641.

(k) *Techand v. Abu* (1881) 5 Bom. 132

(l) *Anandibai v. Rajaram* (1898) 22 Bom. 984.

(m) *Kanachchurree v. Gresh Chunder* (1866) 6 W. R. 315, 64.

(n) *Haridas v. Daroda Kishore* (1900) 27 Cal. 38; *Asad Ali v. Haider Ali* (1910) 38 Cal. 13.

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has taken place under that order. "A judgment-debtor who might have raised objections *prior* to the sale, but who has refrained from doing so and who might have appealed against the order for sale, has no right *after* the sale has been carried out to prefer an objection that the property sold was not legally saleable" (o). But if B was not aware of the proceedings in attachment of the property, or of the proceedings in connection with the sale thereof, the application to set aside the sale would be entertained (p).

61. The Local Government, with the previous sanction of the Governor-General in Council, may, by general or special order published in the local official Gazette, declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear to the Local Government to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment-debtor and his family shall, in the case of all agriculturists or of any class of agriculturists, be exempted from liability to attachment or sale in execution of a decree.

62. (1) No person executing any process under this Code directing or authorizing seizure of moveable property shall enter any dwelling-house after sunset and before sunrise.

(2) No outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the person executing any such process has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe any such property to be.

(3) Where a room in a dwelling-house is in the actual occupancy of a woman who, according to the customs of the country, does not appear in public the person executing the process shall give notice to such woman that she is at liberty to withdraw; and after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution consistent with these provisions to prevent its clandestine removal.

(o) *Umed v. Juv Ram* (1907) 29 All. 612; *Penn. v. Durang v. Krishnaji* (1904) 23 Bom. 125; (p) *Durga Charan v. Kali Prasanna* (1899) 28 Dwarakanath v. Taral Sankar (1907) 34 Cal. 199, Cal. 727, 732.

" Dwelling-house."—A shop or a godown is not a "dwelling-house" within the meaning of this section (g).

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63. (1) Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof, shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached.

Property attached in execution of decrees of several Courts.

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.

Object of the section. The object of this section is to prevent different claims arising out of the attachment and sale of the same property by different Courts. In other words it is to prevent confusion in the execution of decrees.

Application of the section.—A attaches certain property in execution of a decree obtained by him against *B* in the Small Cause Court at Surat. The same property is subsequently attached by *C* in execution of a decree obtained against *B* in the Court of the Subordinate Judge at Surat. The Court of the Subordinate Judge is a Court of higher grade than the Small Cause Court, and it is therefore the proper Court under this section for deciding objections to the attachment, for determining claims made to the property, and for ordering the sale thereof and receiving the sale proceeds (r).

Sub-section (2).—This sub-section is new. It declares in effect that a proceeding in execution shall not be deemed to be invalid merely because it was taken by a Court which ought not to have taken it having regard to the provisions of sub-section (1).

64. Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Private alienation of property after attachment to be void.

Explanation.—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

Object of the section.—*A* sues *B* for Rs. 5,000. *B* owns no property other than a house worth Rs. 5,000. *B* may sell or mortgage the house notwithstanding

(g) *Dumodar v. Ishwar* (1879) 3 Bom. 89.
(r) *Turmullat v. Kalandas* (1895) 19 Bom. 127.

Balla Ram v. Raghubar (1894) 16. All. 11.

- S. 64. the institution of the suit against him, and he may sell or mortgage it even after a decree has been passed against him in the suit, and the sale or mortgage in either case will be perfectly valid and pass a good title to the transferee (s). But if the property is attached in execution of the decree, any private transfer of the property by B contrary to such attachment shall be void as against *all claims enforceable under the attachment*. The object of the section is to prevent fraud on decree-holders (t), and to secure intact the rights of the attaching creditor against the attached property by prohibiting private alienations *pending attachment* (v).

A private transfer under this section is not absolutely void, but void only as against claims enforceable under the attachment.—In execution of a decree obtained by A against B, certain property belonging to B is attached. During the pendency of the attachment, B mortgages the property to C. The property is then sold in execution of the decree and purchased by D. Here the mortgage having been made during the continuance of the attachment is void as against D. That is to say, the purchase is not affected by the mortgage, and D is entitled to take the property free from the mortgage. This illustration shows the operation of the section.

Let us now take the following case: D's property is attached in execution of a decree obtained by A against him. While the attachment is pending, B sells the property to C. B then pays the amount of the decree into Court, the result of which is that the attachment ceases to operate [see O. 21, r. 55]. The sale to C is *valid*, though it was made contrary to the attachment. Such a sale would under the section be void only as against *claims enforceable under the attachment*; but the only claim enforceable under the attachment was that of A, and this having been satisfied by payment into Court, and *there being no other claim enforceable under the attachment, the sale to C is perfectly good* (x).

Explanation to the section: Claims for rateable distribution of assets under s. 73 are claims enforceable under an attachment within the meaning of this section. The explanation to this section is new. It did not occur in the corresponding section (s. 276) of the Code of 1882. Under the old section it was doubtful whether the expression "claims enforceable under the attachment" included "claims for the rateable distribution of assets" (w). The present explanation is added to remove that doubt. The following case illustrates the operation of the explanation: A obtains a decree against B. In execution of the decree A attaches a sum of Rs. 7,000 belonging to B in the hands of a Railway Company. B then assigns the said sum in the hands of the Railway Company to his attorneys for costs due to them *subject to A's attachment*. After the assignment, C, another creditor of B, obtains a decree against B, and in execution of his decree attaches the said sum in the hands of the Railway Company. Thereafter the Company pays the said sum to the Sheriff of Bombay (i.e., the attaching officer). The assignment by B to his attorneys, though made prior to C's attachment, is void as against C's claim, for C's claim is a claim for rateable distribution of assets [Rs. 7,000 within the meaning of s. 73, and therefore a *claim enforceable under the attachment* of A by virtue of the Explanation to this section. C is therefore entitled to be paid in priority to the B's attorneys (x).

O. 21, r. 83, qualifies the prohibition against alienation contained in the present section.—A private transfer of his property by a judgment-debtor made

(s) *Pullen Chetty v. Ramalinga Chetty* (1870) 6 M. H. C. 368.

(t) *Shivlingappa v. Chanbasappa* (1906) 30 Bom. 337, 339.

(u) *Dinooindhu v. Jogmaya* (1902) 29 Cal. 154, 20 I. A. 9.

(v) *Anund Lall v. Jullodhur* (1872) 14 M. I. A. 543, 550.

(w) *Mina Kumari v. Bijoy Singh* (1917) 44 Cal. 662, 673, 44 I. A. 72, 79.

(x) *Sorabji v. Govind* (1892) 16 Bom. 91.

pursuant to the provisions of O 21, r 83, is absolute, notwithstanding the provisions of this section even against claims enforceable under the attachment (y) ———

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SALE

65. Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.

Purchaser's title from

Vesting of property in auction purchaser. In the case of a private sale of immovable property the property vests in the purchaser from the time when the deed of sale is executed. The reason is that a voluntary sale becomes absolute on execution and delivery of the deed by the vendor. In the case, however, of a Court sale, the property does not vest in the purchaser immediately on the sale thereof. The reason is that a compulsory sale does not become absolute until some time after the sale. A period at least thirty days must expire from the date of sale before the sale can become absolute. During that period the sale is liable to be set aside at the instance of the judgment debtor on the ground of irregularity in publishing or conducting the sale, or on deposit by him in Court of the amount specified in the sale proclamation together with a percentage on the purchase money by way of compensation to the purchaser [O 21 r 89-90]. The application by the judgment debtor to set aside the sale in either of these two cases must be made within thirty days from the date of sale. Where no such application is made the Court should not interfere. It is upon such confirmation that the sale becomes absolute [O 21 r 92]. After the sale has become absolute, a certificate is issued by the Court to the purchaser which is called the certificate of sale [O 21 r 94]. Such certificate is valid from the day on which the sale becomes absolute. It is only after the certificate is issued that the property vests in the purchaser. But though the property does not vest in the purchaser until the sale has become absolute, when it does vest it will be deemed to have vested in him from the date when it was sold. The vesting of the property is thus made to relate back to the date of sale. As a result of this, the purchaser is entitled to the benefit of the property from the date of sale.

Sale when void, and when voidable — A sale in execution of a decree is void, if the court is not empowered to sell the property. Thus a Court has no jurisdiction to sell property in execution of a decree if the notice required by O 21, r 22, is not served (2). Similarly a Court has no jurisdiction to sell the property of a person who was not a party to the suit in which the property was sold or properly represented on the record (a). Nor has a Court jurisdiction to sell property without previous attachment (b). In each of these cases the sale is a nullity and must be disregarded without any proceeding to set it aside (c).

But where a Court has jurisdiction to sell the property and the property is sold, the sale is not in any case void. At the most it may be voidable, as where the notice required

(y) *Shringappa v Chembasappa* (1966) 30 Bom 337

(z) *Raghunathdas v Sundar Das* (1914) 41 I A 251, 42 Cal 72

(a) *Khanraj v Drom* (1965) 32 Cal 296, 313

81, 82 I A 2 *Radia Prasad v Jal*

Sahab (1891) 13 All 53, 17 I A 150
Rashid un Nissa v Muhammad (1909) 30 I A 168

(b) *Sorabji v Kala* (1911) 36 Bom 156

(c) 32 Cal 296, 312, *supra*

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by O. 21, r. 22, is served upon a person who was not in fact the legal representative of the deceased judgment-debtor, but whom the Court wrongly held to be his legal representative (d). It may also be voidable on the ground of material irregularity or fraud in publishing or conducting the sale, provided the conditions of O. 21, r. 90, are satisfied. But what is most important to bear in mind is that sales in execution of decrees cannot be avoided on the ground of mere irregularities of procedure in obtaining the decree or in the execution thereof. This subject is dealt with in the next paragraph.

Irregularities of procedure in obtaining decrees or in execution proceedings. Provided that the Court has jurisdiction to sell, a purchaser at a Court-sale is not bound to inquire into the correctness of the decree or of the order for sale. "To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchasers under executions. If the Court has jurisdiction, a purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues" (c). "Strangers to a suit are justified in believing that the Court has done that which, by the direction of the Code, it ought to do" (f). Therefore, where property sold in execution of a decree under the order of a competent Court is purchased by a stranger *bona fide* and for value, the sale cannot be set aside on the ground that the judgment-debtor had a cross-decree of a higher amount and the Court therefore ought not to have directed a sale (g), or that the decree had already been satisfied out of Court at the time the sale was held (h), or that the property was not liable to attachment and sale within the meaning of s. 60 (i), or that the execution of the decree was barred by limitation (j), or that the decree proceeded upon an erroneous view of the law (k), or that the decree was one which the Court ought not to have passed (l). The above principles apply in favour of a third party purchasing at a Court-sale. They do not apply where the decree-holder is himself the purchaser. The reason is that where the decree-holder himself is the purchaser, he must be held to have had notice of all the facts and proceedings relating to the suit and execution proceedings (m).



66. (1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff.

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right

(d) *Malkarjun v. Narhari* (1901) 25 Bom. 337, 348, 27 I. A. 216.

(e) *Reva Mahlon v. Ramkishan Singh* (1887) 11 Cal. 18, 25, 13 I. A. 106.

(f) *Malkarjun v. Narhari* (1901) 25 Bom. 337, 347, 27 I. A. 216.

(g) 14 Cal. 18, *supra*.

(h) *Velloppa v. Ramchandrar* (1897) 21 Bom. 463.

(i) *Dwarkanath v. Turi* (1907) 34 Cal. 199; *Omud v. Jas Ram* (1907) 29 All. 612; *Pandurang v. Krishaji* (1904) 24 Bom.

125.

(j) *Sarada Churn v. Mithond* (1855) 11 Cal. 376.

(k) *Girdharee Lall v. Karoo Lall* (1874) 14 Beng. L. R. 187, 1 I. A. 321.

(l) *Kanawilla v. Chandar Sen* (1900) 22 All. 377.

(m) *Khairajmal v. Daim* (1905) 32 Cal. 296, 315, 32 I. A. 23; *Minu Kumari v. Jagat Sultani* (1884) 10 Cal. 220; *Ganaprasad v. Gopal Singh* (1887) 11 I. A. 241.

of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner. S. 66.

Benami purchases.—The object of the section is to put a stop to benami purchases at execution-sales (*n*). Where *A*, under a secret understanding with *B*, purchases property with his own moneys, but in *B*'s name, the purchase is said to be benami. In such a case *B* is merely a benamidar or ostensible owner, and holds the property in trust for *A*, so that *A* may compel *B* to transfer the property to him (*d*). If, however, *A*'s object in purchasing the property in *B*'s name was to defraud his creditors, and the object of the fraud is carried out the Court will not help *A* in recovering possession of the property from *B*, but if the object of the fraud is not carried out, the Court will help *A* in recovering possession of the property from *B* notwithstanding *A*'s primary intention to effect a fraud. This is the law as applicable to benami purchases at a *private sale* (*o*). The law is more strict in the case of benami purchases at a *Court-sale* so that if *A* purchases property in *B*'s name at a Court-sale, and a certificate of sale is issued to *B* (see O. 21, r. 94), *B* will be *conclusively* deemed to be the real purchaser, and no suit will lie under this section by *A* against *B* for possession of the property, unless *A* can prove that *B*'s name was inserted in the certificate fraudulently or without his consent [see sub-section (2)].

Scope of the section.—This section provides, that no suit shall lie *against* the certified purchaser on the ground that the purchase was made on behalf of the plaintiff. In other words, it is only in suits *against* the certified purchaser *as defendant* that such purchaser shall be *conclusively* deemed to be the real purchaser. Hence if the real owner is actually and honestly in possession, and a suit is brought *by* the certified purchaser *as plaintiff* against the real owner for possession or for rents and profits of the property of which he is the certified purchaser, the real owner may resist the suit on the ground that the certified purchaser was only a benamidar (*p*). And since the section bars suits brought *against* the certified purchaser *as defendant*, a suit *by* such purchaser *as plaintiff* for a declaration that he purchased the property on his own behalf and not benami for another is not barred under this section (*q*). In fact, the present section applies only when a suit is instituted by a person claiming to be the real purchaser as plaintiff *against* the certified purchaser as defendant, alleging that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

Suit by beneficial owner in possession for a declaration of title.—*A* obtains a decree against *B*. In execution of the decree certain property belonging to *B* is sold. *B* himself purchases the property, but the purchase is made in *C*'s name, the certificate of sale is granted to *C*, but *B* continues in possession of the property, and recovers the rents thereof. After some time *C* gives notice to the tenants not to pay the rent to *B*. *B* thereupon sues *C* for a declaration that he is the real owner and for an injunction restraining *C* from interfering with his tenants. Is the suit maintainable under this section? No, according to the Allahabad High Court (*r*). Yes, according to an earlier decision of the Calcutta High Court (*s*). But the correctness of this

(n) *Booth Singh v. Gurnesh Chander* (1874) 12 B. L. R. 317.

(o) *Jadunath v. Ruplal* (1900) 33 Cal. 867; *Sid. Lingappa v. Hirasu* (1907) 31 Bom. 405; *Kondeti v. Nekamma* (1908) 31 Mad. 485. See Indian Trusts Act, 1882, s. 84.

(p) *Bhains v. Lalla Bukoree* (1872) 14 M. L. A. 490; *Lokher v. Kallipudde* (1875) 23 W. R. 353, 2 L. A. 154; *Gorinda v. Lala Kishun*

(1901) 28 Cal. 370; *Vishnu v. Ragho* (1903) 5 Bom. L. R. 220; *Ghazi-ud-din v. Vishnu* (1905) 27 All. 443.

(q) *Uncorroborated Service Bank v. Abdul Bari* (1896) 18 All. 101.

(r) *Bishnu Dind v. Ghazi-ud-din* (1901) 23 All. 175.

(s) *Sadi Churn v. Annapurna* (1896) 2 Cal. 809.

Ss. 66, 67. decision has been doubted by the same Court in a recent case (t). The correct view, it is submitted, is the one taken by the Allahabad High Court.

This section is no bar to a suit by "a third person" for a declaration that the certified purchaser is merely a benamidar.—This is now expressly provided for by sub-sec. (2).

Illustration.

A obtains a decree against B, and attaches certain property alleged to belong to B, C objects to the attachment, alleging that he is the certified purchaser of the property, having purchased the same at a Court-sale held in execution of a decree obtained against B by D. A alleges that the property was purchased by C benami for B, and sues C for a declaration that C was merely the benamidar for B. The suit is not barred under this section, for it is brought not by the beneficial owner, but by a third person.

Joint Hindu family—Partners.—Where property is purchased at a Court-sale by a member of a joint Hindu family in his name, but *with family funds*, the other members are entitled to sue him for a declaration that the purchase was made on behalf of the family, though the certificate of sale stands in his name. The provisions of the section do not apply to such a case. It was so held by their Lordships of the Privy Council in *Bodh Singh v. Guncsh Chunder* (u), a case under the Code of 1859. The law is the same under the present Code. Following this principle, it has been held that when a joint Hindu family consists of two members A and B, and A purchases property at an execution sale with joint funds in the name of C, B is entitled to his share of the property (v). The same principle applies where the parties stand in the relation of partners, and the purchase is made by a partner by the use of partnership funds (w).

67. (1) The Local Government, with the previous sanction of the Governor-General in Council, may, by notification in the local official Gazette, make rules for any local area imposing conditions in respect of the sale of any class of interests in land in execution of decrees for the payment of money, where such interests are so uncertain or undetermined as, in the opinion of the Local Government, to make it impossible to fix their value.

(2) When on the date on which this Code came into operation in any local area, any special rules as to sale of land in execution of decrees were in force therein, the Local Government may, by notification in the local official Gazette, declare such rules to be in force, or may, with the previous sanction of the Governor-General in Council, by a like notification, modify the same.

(t) *Hanuman v. Jadu* (1916) 43 Cal. 20, 26-27.
(u) (1874) 12 B. L. R. 317.
(v) *Natesa v. Venkatramayyan* (1883) 6 Mad. 135; *Minokshi v. Kallanarama* (1897) 20

Mad. 349.
(w) *Achhaibar v. Tapeet* (1907) 29 All. 557 at p. 561.

Every notification issued in the exercise of the powers conferred by this sub-section shall set out the rules so continued or modified.

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Sub-sec. (2) was added to the section by the Code of Civil Procedure Amendment Act I of 1914.

DELEGATION TO COLLECTOR OF POWER TO EXECUTE DECREES AGAINST IMMOVEABLE PROPERTY.

✧ 68. The Local Government may, with the previous sanction of the Governor-General in Council, declare, by notification in the local official Gazette, that in any local area the execution of decrees in cases in which a Court has ordered any immoveable property to be sold, or the execution of any particular kind of such decrees or the execution of decrees ordering the sale of any particular kind of, or interest in, immoveable property, shall be transferred to the Collector.

Power to prescribe rules
for transferring to Collector
execution of certain decrees

✧ 69. The provisions set forth in the Third Schedule shall apply to all cases in which the execution of a decree has been transferred under the last preceding section.

Provisions of Third Schedule to apply

✧ 70. (1) The Local Government may make rules consistent with the aforesaid provisions—

Rules of procedure.

- (a) for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same and for retransmitting the decree from the Collector to the Court ;
- (b) conferring upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector ;
- (c) providing for orders made by the Collector or any gazetted subordinate of the Collector, or orders made on appeal with respect to such orders, being subject to appeal to and revision by, superior revenue-authorities as nearly as may be as the

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orders made by the Court, or orders made on appeal with respect to such orders, would be subject to appeal to and revision by, appellate or revisional Courts under this Code or other law for the time being in force if the decree had not been transferred to the Collector.

(2) A power conferred by rules made under sub-section (1) upon the Collector or any gazetted subordinate of the Collector or upon any appellate or revisional authority, shall not be exercisable by the Court or by any Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the Court.

Juri-
diction
of Civil
Courts barred.

Civil Courts are precluded from interfering in any matter declared by notification to be within the Collector's jurisdiction.—Thus if it is declared by notification that a decree for the sale of a particular kind of property, *e.g.*, "ancestral" property, should be transferred to the Collector for execution, a *sale* of the property by a Civil Court would be void. Such a notification ousts the jurisdiction of the Court so far as regards the execution of the decree (*x*). For the same reason, if the execution of a decree is transferred to the Collector, the Court transferring the decree has no power to *postpone the sale*: the Collector alone can do it (*y*). Similarly, where a decree is transferred for execution to the Collector, and the decree is subsequently *withdrawn*, the application under O. 21, r. 2 [Code of 1882, s. 258] for recording the adjustment should be made to the Collector (*z*).

71. In executing a decree transferred to the Collector under section 68 the Collector and his subordinates shall be deemed to be acting judicially.

Collector deemed to be acting judicially.

72. (1) Where in any local area in which no declaration under section 68 is in force the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the decree may be made within a reasonable period by a temporary alienation of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share.

Where Court may authorize Collector to stay public sale of land.

(x) *Sukhdeo v. Shree Ghatam* (1882) 4 All. 382.

(y) *Dadulal Singh v. Jugal Kishore* (1900) 22 All. 108, 111.

(z) *Mahammad v. Payay Sahu* (1984) 16 All. 228; *Khusalechandra v. Nandram* (1911) 35 Bom. 516.

(2) In every such case the provisions of sections 69 to 71 and of any rules made in pursuance thereof shall apply so far as they are applicable. Ss.
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DISTRIBUTION OF ASSETS.

73. (1) Where assets are held by Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons :—

Proceeds of execution-sale to be rateably distributed among decree-holders—

Provided as follows :—

- (a) Where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale :
- (b) where any property liable to be sold in execution of a decree is subject to mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interests in the proceeds of the sale as he had in the property sold ;
- (c) where any immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—first, in defraying the expenses of the sale ;
secondly, in discharging the amount due under the decree ;
thirdly, in discharging the interest and principal monies due on subsequent incumbrances (if any) ; and,
fourthly, rateably among the holders of decree for the payment of money against the

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judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

(3) Nothing in this section affects any right of the Government.

Rateable Distribution.—The object of this section is to provide a cheap and expeditious remedy for the execution of money-decrees held against the same judgment-debtor by adjusting the claims of rival decree-holders without the necessity for separate proceedings (a). Under the Code of 1859 (s. 270), the creditor who first attached property had a prior claim to have his decree satisfied out of the sale-proceeds to the exclusion of other creditors, but now all judgment-creditors who apply to the Court, *prior to the receipt* of the sale-proceeds by the Court, are entitled to share rateably. *A* obtains a decree against *B* in Court *X* for Rs. 4,000 and applies to that Court for execution of his decree by attachment and sale of certain property belonging to *B*, and the property is thereupon attached. *C* then obtains a decree also against *B* in Court *X* for Rs. 2,000, and applies to that Court for execution of his decree by attachment and sale of the same property attached in execution of *A*'s decree. The property is *then* sold by the Court for Rs. 3,300. *C* is entitled to share rateably in the net sale-proceeds, that is to say, if the net sale-proceeds amount to Rs. 3,000, *A* will be paid Rs. 2,000 and *C* will be paid Rs. 1,000. It is not necessary to entitle *C* to participate in the assets that he should have given notice to *A* of the application made by him for execution of his decree (b).

To entitle a decree-holder to participate in the assets of a judgment-debtor, the following conditions must be present :—

1. The decree-holder claiming to share in the rateable distribution should have *applied for execution* of his decree to the Court by which the assets are held.
2. Such application should have been made *prior to the receipt of the assets* by the Court.
3. The assets of which a rateable distribution is claimed must be *assets held by the Court*.
4. The attaching creditor as well as the decree-holder claiming to participate in the assets should be holders of *decrees for the payment of money*.
5. Such decrees should have been obtained against the *same judgment-debtor*.

No rateable distribution can be claimed under the section unless all the conditions enumerated above are present.

(a) See *Hanson Arva v. Javedonnisia* (1879) 4 Cal. 29. | (b) *Chunni Lal v. Jugul Kishore* (1906) 27 All 132.

Assets held by a Court.—The only kinds of assets that were available for rateable distribution under section 295 of the Code of 1882 were assets realized by *sale* or otherwise by *some process of Court in execution*. The following are instances of assets realized by *process of Court*, and which were held *liable* to rateable distribution under s. 295 :—

- (i) debts attached under O. 21, r. 46, and paid into Court by the garnishee;
- (ii) rents of property under attachment realized by a receiver appointed under s. 51, cl. (d), at the instance of the decree-holder. [The appointment of receiver by the Court in such a case is a “process of execution”];
- (iii) money in the custody of a public officer attached under O. 21, r. 52, and paid into Court by that officer;
- (iv) money realized in execution of a decree held by the judgment-debtor against others, where such decree is attached and realized under O. 21, r. 53.

Assets *not* realized “by sale or otherwise in execution of a decree” were *not* liable to rateable distribution under s. 295. The following are instances of assets *not* realized by sale or otherwise in execution of a decree, and which were held to be *not liable* to rateable distribution under s. 295;

- (1) Sale-proceeds of property attached in execution of a decree and sold by the judgment-debtor by a *private* sale;
- (2) money *voluntarily* paid into Court by the judgment-debtor under O. 21, r. 55, before sale by the Court of the attached property;
- (3) money *voluntarily* paid by a judgment-debtor to the officer arresting him in order to secure his release.

The language of the present section differs from that of s. 295 in that the words “assets held by a Court” are substituted in this section for the words “assets realized by sale or otherwise in execution of a decree” which occurred in s. 295 of the Code of 1882. This gives rise to the question whether the effect of the alteration is to render available for distribution not only assets realized in execution as under the Code of 1882, but also assets realized *otherwise* than in execution. There is no doubt as to items (i), (ii), (iii) and (iv) above; they are liable to rateable distribution both under the old and the new code. The only doubt arises as to items (1), (2) and (3) above. These were *not liable* to rateable distribution under the old code. Are they liable to rateable distribution under the present section? It has been held by the High Court of Bombay that there is no distinction between the old section and the present section, and that the words “assets held by a Court” in the present section refer only to assets held *in the process of execution* as under the Code of 1882 (c). It has accordingly been held that money *voluntarily* paid into Court by a judgment-debtor under O. 21, r. 55 [see item (2) above] not being assets realized in execution, is not liable to rateable distribution, and it must first be applied in payment *in full* of the amount due to the decree-holder at whose instance the property was first attached. And it has also been held by the same Court

- S. 73. that money *voluntarily* paid by a judgment-debtor to the officer arresting him in order to secure his release [see item (3) above] are not liable to rateable distribution (d).

“**Before the receipt of such assets.**”—When a sale has been held by a Court in execution under O. 21, r. 65, receipt of purchase-money by the auctioneer is, for purposes of this section, equivalent to receipt of assets by the Court (c).

Decrees for the payment of money.—It is only holders of *decrees for the payment of money* that are entitled to rateable distribution under this section. A decree for sale of mortgaged property, or for the redemption or foreclosure of a mortgage, is not a decree for the payment of money within the meaning of this section.

Same judgment-debtor.—The provisions of this section do not apply unless the judgment-debtor is the same. Where the holder of a decree against *two or more persons* applies for a rateable distribution of the assets realized from the property belonging to *one of such persons*, the application is one for the execution of the decree against the *same judgment-debtor*.

Illustration.

X obtains a decree against A, and attaches A's property in execution of the decree. Y, who holds a decree against A and B, applies for execution of his decree by attachment and sale of A's property attached in execution of X's decree. Y is entitled under this section to share in the proceeds of the sale of A's property; it is immaterial that Y's decree is against B also and that the decree might have been separately executed against B: *Shumbhoo Nath v. Luckynath* (1883) 9 Cal. 920; *Grant v. Subramanian* (1899) 22 Mad. 241; *Delhi Bank v. Uncovenanted Service Bank* (1888) 10 All. 33.

Similarly, where the holder of a decree against one person applies for a rateable distribution of the assets of that person realized from property belonging to that person and another, such application is an application for the execution of a decree against the *same judgment-debtor*.

Illustration.

X obtains a decree against A, B and C, and attaches in execution of the decree certain property belonging to A, B and C jointly. Y holds a decree against A alone. Y is entitled under the provisions of this section to a proportionate distribution of the assets realized by the sale of the joint property, so far as they represent the share of A in that property. Similarly, if Y held a decree against A and B, he would be entitled to a rateable distribution of the assets so far as they represented the share of A and B in the property: *Ganesh v. Shiva* (1913) 30 Cal. 583; *Gatti Lal v. Bir Bahadur* (1905) 27 All. 158; *Ramanathan v. Subramania* (1903) 26 Mad. 179; *Chhotalal v. Nabibhai* (1905) 7 Bom. L. R. 567. All these were decisions under s. 295 of the Code of 1882. *Quære* whether these decisions have been affected by the introduction in the present section of the word “passed” which did not find a place in the Code of 1882: *Balmer Laurie & Co. v. Jadunath* (1914) 42 Cal. 1.

Sub-sec. (2): Suit for refund.—The scheme of this section is to enable the Court as matter of administration to distribute the assets according to what seem at the time to be the rights of parties without this distribution importing a conclusive adjudication as to those rights, which may be subsequently re-adjusted in a suit brought

d) *Ehji v. Graham & Co.* (1917) 19 Bom. L. R. 274. | (e) *Gulstain v. Woomeschandra* (1917) 44 Cal. 789.

under the penultimate paragraph of the section (f). Such a suit is virtually a suit for money had and received, and the period of limitation is three years from the date of the receipt of the assets by the defendant (g). The suit being one for money *had and received*, it is clear that it should be dismissed as premature, if brought before the moneys have been *actually paid* to the defendant. A mere order to pay the moneys is not sufficient to found the action (h)

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73, 74.

RESISTANCE TO EXECUTION.

74. Where the Court is satisfied that the holder of a decree for the possession of immovable property or that the purchaser of immovable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property.

(f) *Shankarsarup v. Mejo Mal* (1901) 21 All. 313, 322, 28 I A. 203
(g) *Ib* Sec Limitation Act, art. 62

(h) *Hari v. Tara Prasanna Mulherji* (1885) 11 Cal. 718

PART III.

Incidental Proceedings.

COMMISSIONS.

Power of Court to issue
commissions.

75. Subject to such conditions and limitations as may be prescribed, the Court may issue a commission—

- (a) to examine any person ;
- (b) to make a local investigation ;
- (c) to examine or adjust accounts ; or
- (d) to make a partition.

The general powers of Courts in regard to commissions have been summarized in this section. The detailed provisions are set forth in O. 26.

76. (1) A commission for the examination of any person may be issued to any Court (not being a High Court) situate in a province other than the province in which the Court of issue is situate and having jurisdiction in the place in which the person to be examined resides.

(2) Every Court receiving a commission for the examination of any person under sub-section (1) shall examine him or cause him to be examined pursuant thereto, and the commission, when it has been duly executed, shall be returned together with the evidence taken under it to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order.

See O. 26, r. 4.

77. In lieu of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within British India.

Letter of request.

**Commissions
foreign Courts** issued by **78.** The provisions as to the execution **S. 78.**
and return of commissions for the exami-
nation of witness shall apply to commis-
sions issued by—

- (a) Courts situate beyond the limits of British India and established or continued by the authority of His Majesty or of the Governor-General in Council, or
- (b) Courts situate in any part of the British Empire other than British India, or
- (c) Courts of any foreign country for the time being in alliance with His Majesty.

PART IV.

Suits in Particular Cases.

SUITS BY OR AGAINST THE GOVERNMENT OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY.

79. (1) Suits by or against the Govern-
Suits by or against Gov-
ernmentment shall be instituted by or against the
Secretary of State for India in Council.

(2) Nothing in this section shall be deemed to limit or otherwise affect any information exhibited by the Advocate-General in exercise of the power declared by Section 111 of the East India Company Act, 1813.

As to procedure in suits by or against Government, see O. 27.

Scope of the section.—This section does not enlarge on in any way affect the extent of the claims or liabilities enforceable by or against the Secretary of State for India in Council which must always depend on the provisions of the Government of India Act, 1858, s. 65. It gives no cause of action, but only declares the *mode of procedure* when a cause of action has arisen (*i*). The material words of the *said* s. 65 enact that “the Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State for India in Council as they could have done against the said Company.” that is, the East India Company (*j*).

Jurisdiction.—A suit against the Secretary of State for India can only be brought in the Court within the local limits of whose jurisdiction the cause of action has arisen. The words “dwell” or “reside” or “carry on business” or “personally work for gain” which occur in ss. 16, 19 and 20 of the Code and cl. 12 of the Letters Patent do not apply to the Secretary of State in Council (*k*).

Information exhibited by Advocate-General.—The power of the Advocate-General to exhibit information in the nature of actions at law or bills in equity was expressly declared by s. 111 of the East India Company Act, 1813 [53 Geo. 3, c. 155], and kept alive by s. 2 of the Government of India Act, 1833 [3 & 4 Will. 4, c. 85], and again by s. 1 of the Government of India Act, 1853 [16 & 17 Vict., c. 95], and it is now merged in the Statute of 1858 [21 & 22 Vict., c. 106].

(j) *Jehangir v. Secretary of State* (1903) 27 Bom. 189.
(j) See *Secretary of State v. Moment* (1912) 40
1. A. 48, 51-52.

(k) *Doya Narain v. Secretary of State* (1886) 14
Cal. 256; *Rodricks v. Secretary of State*
(1912) 40 Cal. 308.

80. No suit shall be instituted against the Secretary of State for India in Council, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the district, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left. S 80.

Notice.

Provisions of this section imperative.—If the provisions of the section are not complied with, the only course open to the Court is to reject the plaint under O. 7, r. 11, cl. (d) (l).

Object of notice.—The object of the notice required by this section is to give the Secretary of State or the public officer an opportunity of making amends or settling the claims, if so advised, without litigation (m).

Act purporting to be done by a public officer in his "official capacity."—Where a suit is proposed to be instituted against a *public officer*, notice is required only in those cases where the act complained of purports to be done by the officer *in his official capacity*. If the act complained of does not purport to be done by him in his official capacity, no notice is necessary. Thus where it was found that a Police Officer did not act in good faith, but took advantage of his position to commit illegal and tortious acts maliciously and without cause, it was held that no notice was required; the defendant, having acted illegally and in bad faith, could not be said to have acted *in his capacity as a public officer* (n). No such distinction obtains in suits against the *Secretary of State for India in Council*. Where a suit is proposed to be instituted against the *Secretary of State for India in Council*, notice to him under this section must be given *in all cases*, whether the act in respect of which the suit is to be brought purports to be done by him *in his official capacity or not* (o).

Whether notice necessary in a suit for an injunction.—Where a suit is brought against a *public officer* for an *injunction* to restrain him from doing an act threatened to be done by him, no notice is necessary to be given under this section. The reason is that this section applies where a relief is sought in respect of an act *done* by a public officer, and not where relief is sought in respect of an act not done, but threatened *to be done* (p). It must, however, be noted that the words "act purporting to be done" relate to a public officer, and not to the Secretary of State. Therefore, notice must be given to the *Secretary of State*, even though the suit against him may be one for an injunction (q), unless the circumstances of the case are such that if notice has to be given

(l) *Bachchu v. Secretary of State* (1902) 25 All. 137.
(m) *Secretary of State v. Perumal* (1901) 24 Mad. 279.

(n) *Muhammad v. Panna Lal* (1904) 26 Al. 220;
Ganoda Senghri v. Nalini (1904) 36 Cal. 28.

(o) *Secretary of State v. Rajlucki* (1898) 25 Cal. 239, 242.

(p) *Ganoda Senghri v. Nalini* (1904) 36 Cal. 28, 39.
(q) *Secretary of State v. Gajanan* (1911) 35 Bom. 362; *Secretary of State v. Kalekhun* (1912) 37 Mad. 113.

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80, 81.

and the plaintiff has to wait for two months, irreparable injury may be done to him in the meantime, as where Government threaten that unless the plaintiff removed a structure alleged to be an encroachment on Government land, the Government would forthwith demolish the structure (r).

Acts.—The act contemplated by this section is a *tort* or wrong inadvertently done by a public officer in the discharge of his duties. The only class of cases in which it is necessary to give notice to a public officer under this section is where the suit is founded on *tort*. No notice is necessary where the suit is founded on *contract* or any *other cause of action*. The following are some of the leading cases :—

(1) *Suit founded upon tort.*—A sues B, a District Magistrate, for damages for wrongful arrest, alleging that the Magistrate committed him to take his trial before the Court of Sessions, and enlarged him on bail, that subsequently while the plaintiff was ill and under medical treatment, the Magistrate, without giving him any notice, cancelled the order for bail, and illegally and maliciously caused him to be arrested under a warrant issued by him. Here the act complained of amounts to a *tort* purporting to be committed by the Magistrate in his official capacity, and notice is therefore necessary before institution of the suit : *Jogendra v. Price* (1897) 24 Cal. 584.

Where the suit is one founded upon *tort*, notice must be given whether the relief sought is for *damages*, or merely for a *declaration* that the act complained of is against the provisions of law and therefore illegal (s).

(2) *Suit founded upon contract.*—A sues B, a public officer, to recover the price of certain timber supplied by him to B. No notice is necessary, for the suit is not in respect of any tort or wrong done by B, but is one for damages for breach of a contract. *Rajmal v. Hanmant* (1896) 20 Bom. 697.

(3) *Suit founded upon a contract implied in law.*—A suit against a public officer for the recovery of money paid to him under protest is one sounding substantially in *tort*, though in form it is one for money had and received. Notice, therefore, of such a suit must be given before the suit is instituted : *Cecil Gray v. The Cantonment Committee of Poona* (1910) 34 Bom. 583. See Indian Contract Act, s. 72, ill. (b).

(4) *Suit founded upon other causes of action.*—No notice is necessary in a suit proposed to be instituted against the Official Trustee to determine the rights of beneficiaries to a trust fund in his hands. The reason is that such a suit is not in respect of any *wrong* or *tort* committed by the Official Trustee in the discharge of his official duties : *Shahbazade v. Fergusson* (1881) 7 Cal. 499.

Amendment of plaint.—No amendment will be allowed if the effect of the amendment will be to convert the suit into another of a different character, e.g., a suit based on negligence into one based on nuisance. In such a case a fresh suit must be brought after giving fresh notice as required by this section (t).

81. In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity—

Exemption from arrest
and personal appearance.

(r) *Secretary of State v. Gulam Rasul* (1918) 40 Bom. 392.
(s) *Chhaganlal v. The Collector of Katra* (1910) 35

Bom. 42.
(t) *McInerney v. Secretary of State* (1911) 38 Cal. 797.

(a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and

(b) where the Court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person.

Sec.
81-83.

"Otherwise than in execution of a decree."—The object of clause (a) is to exempt a defendant who is a public officer from mesne arrest and his property from mesne attachment. See O. 27, i, 8.

82. (1) Where the decree is against the Secretary of State for India in Council or against a public officer in respect of any such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied; and, if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the local Government.

Execution of decree.

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report.

SUITS BY ALIENS AND BY OR AGAINST FOREIGN AND NATIVE RULERS.

✕ 83. (1) Alien enemies residing in British India with the permission of the Governor-General in Council, and alien friends, may sue in the Courts of British India, as if they were subjects of His Majesty.

When aliens may sue.

(2) No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts.

Explanation.—Every person residing in a foreign country, the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of His Majesty's Secretaries of State or of a Secretary to the Government of India, shall, for the purpose of sub-section (2), be deemed to be an alien enemy residing in a foreign country.

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83-85.

Alien enemy.—As to who are alien enemies, see the undermentioned case (u).

84. (1) A foreign State may sue in any Court of British India : Provided that such State has been recognized by His Majesty or by the Governor-General in Council ;

When foreign States may sue.
Provided, also, that the object of the suit is to enforce a private right vested in the head of such State or in any officer of such State in his public capacity.

(2) Every Court shall take judicial notice of the fact that a foreign State has or has not been recognized by His Majesty or by the Governor-General in Council.

Private right vested in the head of a State.—That is, those *private* rights of a State that must be enforced through a Court of Justice as distinguished from its *political* rights (v).

85. (1) Persons specially appointed by order of the Government at the request of any Sovereign, Prince or Ruling Chief, whether in Subordinate alliance with the British Government or otherwise, and whether residing within or without British India, or at the request of any person competent, in the opinion of the Government, to act on behalf of such Prince or Chief, to prosecute or defend on behalf of such Prince or Chief, shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief.

(2) An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Prince or Chief.

(3) A person appointed under this section may authorize or appoint persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto.

(u) *Jayson v. Driefountain Consolidated Mines*. | (v) *Hajoo v. Bar Singh* (1885) 12 C.J.L. 17.
Id. (1902) App. Cas. 484, at p. 507.

S. 86. **86.** (1) Any such Prince or Chief, and any ambassador or envoy of a foreign State, may, with the consent of the Governor-General in Council, certified by the signature of a Secretary to the Government of India, but not without such consent, be sued in any competent Court.

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, ambassador or envoy may be sued; but it shall not be given unless it appears to the Government that the Prince, Chief, ambassador or envoy -

(a) has instituted a suit in the Court against the person desiring to sue him, or

(b) by himself or another trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immoveable property situate within those limits and is to be sued with reference to such property or for money charged thereon.

(3) No such Prince, Chief, ambassador or envoy shall be arrested under this Code, and, except with the consent of the Governor-General in Council certified as aforesaid, no decree shall be executed against the property of any such Prince, Chief, ambassador or envoy.

(4) The Governor-General in Council may, by notification in the *Gazette of India*, authorise a Local Government and any Secretary to that Government to exercise, with respect to any Prince, Chief, ambassador or envoy named in the notification, the functions assigned by the foregoing subsections to the Governor-General in Council and a Secretary to the Government of India, respectively.

(5) A person may, as a tenant of immoveable property, sue, without such consent as is mentioned in this section, a Prince, Chief, ambassador or envoy from whom he holds or claims to hold the property.

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86-88.**

Consent must be obtained before institution of suit.—This section provides that a Sovereign Prince or Ruling Chief may be sued in any competent Court with the consent of the Governor-General in Council. Such consent must be obtained before the institution of the suit; a consent given after the institution of the suit is not a sufficient consent under this section. If the consent is not obtained before the institution of the suit, the Court should dismiss the suit, or, perhaps, allow the plaintiff to withdraw it with liberty to bring a fresh suit under O. 23, r. 1 (w).

Waiver of objection to want of consent.—If a suit is instituted against a Sovereign Prince without the consent of the Governor-General in Council, and the plaintiff is admitted, the case is one not of *absence* of jurisdiction, but of *irregular exercise of jurisdiction*. The result is that if the defendant fails to object to the institution of the suit in his written statement, and does not object until the suit is ripe for hearing, he will be deemed to have *waved* the objection, and will be precluded from taking the objection at a later stage of the suit (v).

6.

Style of Princes and
Chiefs as parties to suit.

87. A Sovereign Prince or Ruling Chief may sue, and shall be sued, in the name of his State :

Provided that in giving the consent referred to in the foregoing section the Governor-General in Council or the Local Government, as the case may be, may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name.

INTERPLEADER.

88. Where two or more persons claim adversely to one another the same debt, sum of money or other property, moveable or immoveable, from another person who claims no interest therein other than for charges or costs, and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made, and of obtaining indemnity for himself :

Where interpleader suit
may be instituted.

Provided that where any suit is pending in which the rights of all parties can properly be decided, no such suit of interpleader shall be instituted.

What is an interpleader suit.—An interpleader suit is one in which the real dispute is between the defendants only, and the defendants *interplead*, that is to say, plead against each other instead of pleading against the plaintiff as in an ordinary suit.

(w) *Chandulal v. Anad Ben Umar* (1697) 21 Bom. 351, 355-56.
(z) *Ib.* As to what amounts to a submission to

jurisdiction, see *Mighell v. Sultan of Johore* (1893) 1 Q. B. 149.

In every interpleader suit there must be some debt or sum of money or other property in dispute between the defendants only, and the plaintiff must be a person who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to such of the defendants as may be declared by the Court to be entitled to it. Thus suppose certain property is claimed by *A* as well as by *B*, and *X* is in possession of that property, and claims no interest in the property himself, and is ready and willing to deliver it to such party as may be declared by the Court to be the rightful owner of it, *X* as plaintiff may institute an interpleader suit against *A* and *B* as defendants. In such a case *X* will, as a rule, be dismissed from the suit at the first hearing after his costs are provided for, and *A* and *B* will be left to interplead and to fight the matter out between themselves exactly as if one of them was plaintiff and the other was defendant (O. 35, r. 4). But before the plaintiff is dismissed from the suit, he must deposit the property in dispute in Court (O. 35, r. 2).

S. 88.

Who claims no interest other than for charges or costs.—A railway company which claims no interest in goods in its possession other than a lien on the goods for wharfage, demurrage and freight, may institute an interpleader suit, when the goods are claimed by two persons adversely to each other (*y*).

(*y*) *Bombay and Baroda Ry. Co. v. Sassoon* (1894) 18 Bom. 231.

PART V.

Special Proceedings.

ARBITRATION.

89. (1) Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the second Schedule.

Arbitration.

(2) The provisions of the second Schedule shall not affect any arbitration pending at the commencement of this Code, but shall apply to any arbitration after that date under any agreement or reference made before the commencement of this Code.

Indian Arbitration Act, IX of 1899—Application of the Act.—This Act came into force on the first day of July 1899. It relates to “arbitration by agreement without the intervention of a Court of Justice,” that is to say, to private arbitrations only. Sec. 3 of the Act provides that sections 523 to 526 of the Code of 1882 [now paras. 17, 19 and 20 of Sch. II] shall not apply to any submission or arbitration to which the Act applies. The question then arises as to what cases does the Act apply? Sec. 2 of the Act provides that the Act “shall apply only in cases where, if the subject-matter submitted to arbitration were the subject of a suit could, whether with leave or otherwise, be instituted in a Presidency town.” The terms of the said sec. 2 show that two conditions must be present before the provisions of the Arbitration Act can be applied to an agreement to refer matters in dispute to arbitration, namely, (1) that there must be *no suit pending* in respect of those matters (c), and (2) that the case must be one in respect of which if either party wanted to bring a suit, the suit could be instituted in a *Presidency Town*. In those cases where the Arbitration Act does not apply, the provisions of paras. 17, 19 and 20 of Sch. II will apply.

SPECIAL CASES.

90. Where any persons agree in writing to state a case for the opinion of the Court, then the Court shall try and determine the same in the manner prescribed.

Power to state a case for opinion of Court.

See O. 36 below.

(c) *Ramjidas v. House* (1907) 35 Cal. 199, 200; *Peruri v. Gullapudi* (1909) 34 Bom. 372, 373.

SUITS RELATING TO PUBLIC MATTERS.

91. (1) In the case of a public nuisance the Advocate-General, or two or more persons having obtained the consent in writing of the Advocate-General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

This section is new. It creates a right of action where there was none before.

Remedies for a public nuisance.—Nuisances are of two kinds—(1) public and (2) private.

A public nuisance is an act or illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right [Indian Penal Code, s. 126].

Where a person commits a public nuisance—

- (a) he is liable to criminal prosecution under the Indian Penal Code;
- (b) he may be proceeded against under this section;
- (c) he is liable to damages in a suit at the instance of a private individual who suffers *special damage* by reason of the nuisance, that is, damage *beyond* what is suffered by him in common with all other persons affected by the nuisance (a).

These remedies, it is conceived, are concurrent. The institution of a criminal prosecution does not bar a suit under this section nor does the institution of a suit under this section bar a criminal prosecution, though cases can be conceived where the Advocate-General may, in the exercise of his discretion, refuse his consent under this section, where a criminal prosecution is pending in respect of the same act or omission.

Illustration.—A keeps his horses and waggons standing for an unreasonable time in the highway.

(a) This is a public nuisance for which a criminal prosecution may be instituted against A.

(b) Further, a suit may be instituted against A under the present section by the Advocate-General, or by two or more persons with the consent in writing of the Advocate-General, though no special damage has been caused to those persons, for an order requiring A to abate the nuisance, and for an injunction restraining him from continuing the nuisance.

(a) *Bhuvan Singh v. Narotam Singh* (1909) 31 All. 444.

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91, 92.

(c) If the horses and waggons are kept standing opposite a man's honso so that the access of customers is obstructed, the house is darkened, and the people in it are annoyed by bad smells, a suit may be brought against A by the occupiers for damages so caused being sufficiently *special* to entitle them to maintain the action (b). The mere fact that a suit has been instituted under this section against A by the Advocate-General at the relation of the occupiers, or by the occupiers themselves as plaintiffs with the consent of the Advocate-General, will not preclude the occupiers from maintaining a *private action* against A for the *special* damage caused to them [See sub-sec. (2)].

92. (1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature,

or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

- (a) removing any trustee ;
- (b) appointing a new trustee ;
- (c) vesting any property in a trustee ;
- (d) directing accounts and inquiries ;
- (e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust ;
- (f) authorizing the whole or any part of the trust property to be let, sold, mortgaged or exchanged ;
- (g) settling a scheme ; or
- (h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

(b) *Benjamin v. Storr* (1871) L. R. 9 C. P. 400; *Poorobashi Pal v. Bhoobun Chunder Dey* (1874) 22 W. R. 408.

S. 92.

Object of the section.—"The real object of the special provisions of this section seems to us to be clear. Persons interested in any trust were, if they could *all* join, always competent to maintain a suit against any trustee for his removal for breach of trust; but where the joining of *all* of them was inconvenient or impracticable, it was considered desirable that some of them might sue without joining the others, provided they obtained the consent of the Advocate-General or of the Collector of the District: and this condition was imposed to prevent an *indefinite number of reckless and harassing suits* being brought against trustees by different persons interested in the trust" (c).

Who may sue under this section.—A suit under this section may be brought—

- (1) by the Advocate-General, and outside the Presidency towns, by the Collector or such officer as the Local Government may appoint in that behalf [see s. 93], or
- (2) by two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General. The "consent in writing" must be a specific permission given to two or more persons *by name*: a permission given to one applicant by name "and another" is not a sufficient compliance with the terms of this section (d). A suit under this section brought by only one plaintiff with the consent of the Advocate-General is bad at its institution, and the plaint cannot be amended by the addition of a second plaintiff, though the Advocate-General may consent to the amendment. No power is given to the Advocate-General under this section to consent to any *amendment* of the plaint (e).

"Interest in the trust".—When a suit under this section is not instituted by the Advocate-General, it must be brought by at least two persons, and such persons must have an *interest* in the trust. The interest in the trust need not be *direct*. Thus persons entitled to worship in a temple have such an interest in the trust as to enable them to institute a suit with the consent of the Advocate-General against the trustees of the temple (f). Similarly persons residing in a village, whose business it was to conduct pilgrims to a shrine and perform the worship of the idol on their behalf, were held to have a sufficient interest to entitle them to sue under this section (g).

Consent of the Advocate-General.—The "consent in writing" required by this section is a condition precedent to the institution of the suit to which such consent relates. If, therefore, no valid consent is given before the institution of the suit, the suit must be dismissed, or the plaintiff may be allowed to withdraw the suit with liberty to bring a fresh suit. The defect cannot be rectified *after* the institution of the suit (h). And where such consent is given, the suit must be confined to the matters included in the consent; it is not competent to the Court to grant reliefs other than those included in the terms of the consent (i). It follows from this that where a plaint in a suit brought under this section is amended, *e.g.*, where a new party is added as a

(c) *Sajedur Raju v. Gour Mohun Das* (1897) 21 Cal. 418, 425; *Budree Das v. Chooni Lal* (1906) 33 Cal. 789, 804; *D'Cruz v. D'Silva* (1900) 32 Mad. 131, 135.

(d) *Gopal Dei v. Kanno Dei* (1904) 26 All. 162.

(e) *Darves Haggi Mahamad v. Javvudin* (1906) 30 Bom. 603.

(f) *Sajedur v. Gour Mohun* (1906) 24 Cal. 418; *Jugalkichore v. Lakshmandas* (1890) 23

Bom. 659.

(g) *Munohar v. Lakshmiram* (1888) 12 Bom. 247; *Chotalal v. Manohar* (1900) 24 Bom. 50, 26 I. A. 199.

(h) *Tricumdas v. Khimji* (1892) 16 Bom. 626;

Gopal Dei v. Kanno Dei (1904) 26 All. 162.

(i) *Sayad Hussein v. Collector of Kai* (1897) 21 Bom. 237.

S. 92 defendant and possession of the trust property is claimed from him, the Court must dismiss the suit (j)

Clause (c): vesting any property in a trustee.—Under this section, the Court in sanctioning a scheme may provide for the appointment of additional or new trustees though such appointment may not be in conformity with the original constitution of the trust or with the rules in force in respect to it (k).

Clause (h): further or other relief.—“The words ‘granting such further or other relief as the nature of the case may require,’ must be read with what has preceded as referring to further relief to which the party may be entitled which arises out of the existence of the trust in respect of which the suit has been brought.” Therefore, where the only relief claimed in a suit is for a declaration that certain property is *wakf* property, the suit does not come within the purview of this section. Such a relief does not come within the words “further or other relief” (l).

When the section applies.—This section does not apply, unless—

- (1) there is an express or constructive trust created for public purposes of a charitable or religious nature.
- (2) there is a breach alleged of such trust, or the direction of the Court is deemed necessary for the administration of such trust.
- (3) the relief claimed is one or other of the reliefs mentioned in the section (m). [See notes above, “clause (h): further or other relief”].

Suits to enforce private rights.—Suits brought not to establish a *public right* in respect of a public trust, but to remedy a particular infringement of an *individual right*, are not within this section (n). Such suits are to be instituted in the ordinary manner, and they are not to be brought under this section. The following are instances of suits of this character:—

- (1) a suit by a person claiming to be a co-trustee of certain *dargahs* and to be entitled to a share with the defendant trustee in the management and profits thereof: *Miya Vali Ulla v. Sayed Bava* (1898) 22 Bom. 496;
- (2) a suit by the trustees of a fire temple for the vindication of the right of management which was vested in and actually being exercised by them at the date of the obstruction by the defendants: *Natroji v. Dastur Kharsedji* (1904) 28 Bom. 20, 54;
- (3) a suit between the individuals, each claiming certain rights as *mutawali* over *wakf* property: *Manijan v. Khadim Hossein* (1905) 32 Cal. 273;
- (4) a suit between two persons as to which of them is the lawful trustee of a charity: *Budree Das v. Chooni Lal* (1906) 33 Cal. 789, 808; *Muhammad v. Ahmed* (1913) 35 All. 450; *Niamat Ali v. Ali Reza* (1914) 37 All. 86; *Ayali unessa v. Kolfu* (1914) 41 Cal. 749; *Giyana v. Kandusami* (1887) 10 Mad. 375.

Suits for possession of trust property against trespassers and against alienees from trustees.—Suits against strangers to the trust, that is, against

(j) *Abdul Rehman v. Cassum* (1911) 36 Bom. 168.
 (k) *Prayag Dass v. Tirumala* (1906) 28 Mad. 319.
 (l) *Jamal-uddin v. Mufataba Husain* (1903) 25 All. 631, 635.

(m) See the judgment of Woodroffe, J., in *Budree Das v. Chooni Lal* (1906) 33 Cal. 789.
 (n) See *per Davar, J.*, in *Dinsha Petit v. Jamselji* (1909) 33 Bom. 510, 529-530.

trespassers and against transferees of trust property from trustees, for recovery of a possession of trust property from them, are not within this section. Such suits are to be instituted in the ordinary manner, and they are not to be brought under this section (o). The following are instances of suits of this character:—

S. 92

- (1) a suit for a declaration that a certain piece of land of which it was alleged the defendants had taken wrongful possession was a public graveyard, and for the ejection of the defendants from the land: *Dasandhay v. Muhammad* (1911) 33 All. 660. [Here the claim against the defendants is one as against trespassers.]
- (2) a suit to set aside an alienation of trust property alleged to have been wrongfully made by the trustees, and for the recovery of such property from the hands of the alienee: *Ghelabhai v. Uderam* (1911) 36 Bom. 29. [Here the defendants are transferees from trustees.]
- (3) a suit by the trustees of a temple against the manager and treasurer of the temple for accounts and for a decree for what may be found due on taking such accounts: *Mallur v. Narasinha* (1912) 37 Bom. 95.
- (4) a suit by the worshippers of a temple to set aside a perpetual lease granted by the Temple Committee: *Venkataramana v. Kasturiranga* (1917) 40 Mad. 212 [F. B.]

Sub-section (2): this section is mandatory.—The suits referred to in subsec. (1) *can only be instituted in the special Courts mentioned in this section, and they can only be brought either by the Advocate-General, or by two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General.*

“Save as provided by the Religious Endowments Act, 1863.”—The Religious Endowments Act applies only to *public* religious endowments. It does not apply to *private* religious endowments. S. 7 of the Act provides for the appointment of Committees for the management of endowed properties. S. 14 of the Act provides that any person interested in any mosque, temple, or religious establishment may sue the trustees or members of a Committee appointed under the Act *for any misfeasance, breach of trust, or neglect of duty, committed by them in respect of the trust vested in them, and the Court may in such suit direct the specific performance of any act by them, and may decree damages and costs against them, and may also direct the removal of any of the trustees or any member of a Committee.* A suit which does not charge the trustee or member of a Committee with misfeasance, breach of trust, or neglect of duty, does not lie under that section. S. 18 provides that *no suit under the Act shall be instituted without the leave of the Court.*

The Act is in force in all Presidencies except the Presidency of Bombay where it is in force in North Canara only. But it does not apply to Presidency towns; so that a suit instituted in a Chartered High Court in the exercise of its ordinary original jurisdiction inherited from the Supreme Court charging neglect of duty on the part of a temple trustee, does not require the leave of the Court under s. 18 of the Act (p).

Relators cannot appeal in their own right.—Where a suit instituted under this section by the Advocate-General at the instance of relators is dismissed, and

(o) *Budree Das v. Chhanti Lal* (1900) 33 Cal. 789, 805.

(p) *Panch Cowrie Mulla v. Chumroo Lal* (1878) 3

Cal. 563; *Annasami Pillai v. Rama Krishna Mudaliar* (1901) 24 Mad. 219.

Ss. the Advocate-General does not think fit to appeal, it is not competent to the relators to
92, 93. file an appeal on their own account against the decree dismissing the suit (q). The reason
 is that relators are *not parties* to the suit. It is *only a party* to a suit that is entitled to
 appeal (r).

93. The powers conferred by sections 91 and 92 on the
 Advocate-General may, outside the Pre-
 sidency-towns, be, with the previous sanc-
 tion of the Local Government, exercised
 also by the Collector or by such officer
 as the Local Government may appoint in this behalf.

(q) *Jam Malomed v. Syed Nuruddin* (1908) 32 Bom.
 155.

(r) *Attorney-General v. Wright* (1841) 3 Beav. 447.

Attorney-General v. Logan (1891) 2 Q. B.
 100, 106.

PART VI.

Supplemental Proceedings.

94. In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed :—
Supplemental proceedings.

- (a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison ;
- (b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property ;
- (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold ;
- (d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property ;
- (e) make such other interlocutory orders as may appear to the Court to be just and convenient.

This section summarizes the general powers of the Court in regard to interlocutory proceedings. The details of procedure have been relegated to Schedule I. See O. 38, O. 39, and O. 40.

Compensation for obtaining arrest, attachment or injunction on insufficient grounds.

95. (1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last preceding section—

not.
During the proceedings,

5 of the (a) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or

- S. 95. (b) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same,

the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him :

Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction.

- (2) An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction.

This section is no bar to a regular suit.—This section provides a summary remedy for an injured defendant, and enables him to seek compensation for the injury done to him by the plaintiff by merely presenting an *application* to the Court, instead of resorting to the expensive machinery of a *regular suit*. But the remedy under this section is optional, and an injured defendant may, if he so chooses, institute a regular suit against the plaintiff for compensation for wrongful arrest, attachment or injunction. If a *suit*, however, is brought for compensation, the plaintiff must prove malice in fact in addition to the facts required to be proved by this section (c).

Amount of compensation.—Note that the amount of compensation under this section cannot exceed Rs. 1,000. Where a defendant claims a larger amount of compensation, he must institute a regular suit.

(c) *Naryappa v. Ganapathi* (1911) 35 Mad. 598.

PART VII.

Appeals.

APPEALS FROM ORIGINAL DECREES.

96. (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

Appeal from original decree.

(2) An appeal may lie from an original decree passed *ex parte*.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

Right of appeal.—It is not to be assumed that there is a right of appeal in every matter which comes under the consideration of a Court; such right must be given by statute, or by some authority equivalent to a statute (t). “Unless a right of appeal is clearly given by statute, it does not exist, whereas a litigant has independently of any statute a right to institute any *suit* of a civil nature in some Court or another” (u). No right of appeal can be given except by *express* words (v) Note in the present section the *express* words “an appeal shall lie from every decree.”

Agreement not to appeal.—An agreement whereby the parties agree not to appeal from a decree is binding upon the parties thereto, if it is for a lawful consideration and is otherwise valid (w). But an agreement by the next friend of a minor not to appeal is not binding on the minor (x).

Consent-decrees not appealable.—Sub-section (3), in so far as it bars an appeal from consent-decrees, gives effect to the principle that a judgment by consent acts as an estoppel (y). But a consent-decree can be set aside on any ground that would invalidate an agreement, such as misrepresentation, fraud, mistake (z). This, however, cannot be done by an appeal, but it must be done by a *fresh suit* brought for the purpose (a) In some cases it may be done by an application for a review (b). But it cannot be set aside by a rule (c).

(t) *Miyakshi v. Subramanga* (1884) 11 Mad. 26, 33, 14 I. A. 160; *Rangoon Botatoung Co. v. Collector of Rangoon* (1912) 40 Cal. 21, 27, 39 I. A. 197, 200.

(u) *Zair Husain Khan v. Khurshed Jan* (1906) 28 All. 549, 550.

(v) *Narayan v. Secretary of State* (1890) 20 Bom. 203.

(w) *Amir Ali v. Indrajit* (1871) 14 M. I. A. 203.

(x) *Rhodes v. Swinthenbank* (1889) 22 Q. B. D. 577.

(y) *Re S. American Co.* (1895) 1 Ch. 37.

(z) *Huddersfield Banking Co. v. Lister* (1895) 2 Ch. 273.

(a) *Mirali v. Rehmoobhoy* (1891) 15 Bom. 594.

(b) *Aushootosh v. Tara* (1884), 10 Cal. 612, 615.

(c) *Fatmabai v. Sonbai* (1911) 36 Bom. 77.

Ss.
97-99.

97. Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

Appeal from final decree where no appeal from preliminary decree.

reversed.

Object of the section.—The object of the section is to estop parties aggrieved by a preliminary decree, who do not appeal from such decree within the period of limitation, from afterwards disputing its correctness in any appeal which may be preferred from a final decree. [See notes to s. 2, cls. (2) and (3).]

A party aggrieved by a preliminary decree must appeal from the decree within the period of limitation. It is unreasonable that he should allow proceedings to be carried on to their final stage and large costs to be incurred, and then object to the preliminary decree in an appeal from the final decree.

98. (1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

Decision where appeal heard by two or more Judges

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed.

Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ, and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

"Differ in opinion on a point of law."—No reference can be made under this section if the Judges differ on a question of fact. The power to refer can only be exercised if there is a difference of opinion of law (*d*).

99. No decree shall be reversed or substantially varied, nor shall any case be remanded in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit.

No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.

not affecting the merits of the case or the jurisdiction of the Court. Ss.
99, 100.

Scope of the section.—The mere circumstance of there being an error, defect or irregularity in any proceeding in a suit is no ground for reversing or varying a decree in appeal. But if it appears that the error, defect or irregularity affected the merits of the case or the jurisdiction of the Court, it would be a ground for reversing or varying the decree. Where an irregularity is one which affects the merits of a case or the jurisdiction of a Court, it is said to be a *material* irregularity. Where it does not, it is usually spoken of as a *mere* irregularity. This section cures a *mere* irregularity, error or defect. It does not cure a *material* irregularity, error or defect.

“Misjoinder of parties or causes of action.”—This expression may be amplified, and the rule contained in this part of the section may be stated as follows :—

No decree shall be reversed or substantially varied, nor shall any case be remanded in appeal, on account of—

- (1) misjoinder of plaintiffs (O. 1. r. 1);
- (2) misjoinder of defendants (O. 1. r. 3);
- (3) misjoinder of plaintiffs and causes of action (O. 2. r. 3);
- (4) misjoinder of defendants and causes of action (O. 2. r. 3);
- (5) misjoinder of causes of action (O. 2. rr. 3, 4 and 5).

The words “on account of any misjoinder of parties or causes of action” have been inserted in the section to make it clear that such a misjoinder is to be treated a *mere* irregularity. Non-joinder of parties stands on the same footing as misjoinder (c).

Error, defect or irregularity not affecting the merits of the case.—A decree will not be reversed or substantially varied in appeal for admitting a document not properly stamped (j), or for admitting a document declared invalid where the judgment is not based on that document, but on other grounds (g), or because the wrong side was allowed to begin (h), or because the suit was decided on a Sunday (i), these being irregularities not affecting the merits of the case or the jurisdiction of the Court. Irregularities of this character are cured by the present section. The exclusion of evidence by the lower Court is an irregularity which may or may not affect the merits of the case: if it does not, the irregularity will be condoned under this section (j) [see Indian Evidence Act. 1872. s. 167].

APPEALS FROM APPELLATE DECREES.

100. (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds, namely :—

Second appeal.

- (a) the decision being contrary to law or to some usage having the force of law ;

(e) *Yakkunath v. Manakkut* (1909) 33 Mad. 436.
(f) *Devachand v. Hirachand* (1889) 13 Bom. 449.
(g) *Womes Chander v. Chundee Churn* (1881) 7 Cal. 293; *Girdhar v. Ganpat* (1874) 11 B. H. C. 153.

(h) *Makund v. Bahori Lal* (1881) 3 All. 824.
(i) *Sheoram v. Thakur* (1908) 30 All. 136.
(j) *DeSouza v. Pestaji* (1884) 8 Bom. 408; *Surjyamoní v. Kali Kanta* (1901) 28 Cal. 37, 52.

S. 100.

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

(2) An appeal may lie under this section from an appellate decree passed *ex parte*.

Scope of the section.—This section deals with second or special appeals. A second appeal can lie only to the High Court. A Court of first appeal is competent to enter into questions of fact, and decide whether the findings of facts by the lower Court are or are not erroneous. But a Court of second appeal is not competent to entertain questions as to the soundness of finding of *fact* by the Court below (k). A second appeal can only lie on one or other of the grounds specified in the present section (l). The limitations to the power of the Court imposed by ss. 100 and 101 in a second appeal ought to be attended to, and an appellant ought not to be allowed to question the finding of the first appellate Court upon a matter of fact (m). "Nothing can be clearer than the declaration in the Civil Procedure Code that no second appeal will lie except on the grounds specified in section [100]. No Court in India or elsewhere has power to add to or enlarge those grounds" (n).

No second appeal will lie on the ground of an erroneous finding of fact.—There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of *fact*, however gross or inexcusable the error may seem to be. No doubt, a second appeal does lie where there is a substantial error or defect in procedure [sec. cl. (c)]. But an erroneous finding of fact is a different thing from an error or defect in procedure. Where there is no error or defect in procedure, the finding of the first appellate Court upon a question of fact is final, *if that Court had before it evidence proper for its consideration in support of the finding* (o).

A second appeal will lie where a fact has been found without any evidence to support it.—It follows from the words italicized in the next preceding paragraph that a second appeal will lie where there is a finding *without any evidence* to support it, or if the finding is based on *irrelevant matters*, or on a *misconception of what the evidence is*. All these are cases of *substantial error or defect in procedure*, and a second appeal will therefore lie under cl. (c) of the section (p).

A second appeal will lie to impeach legal conclusions drawn from findings of fact.—Though a second appeal does not lie upon a finding of fact, yet if a *legal conclusion* is drawn from the finding, a second appeal will lie under cl. (a) of the section

(k) *Ram Gopal v. Shamkhatoon* (1893) 20 Cal. 93, 19 I. A. 288.

(l) *Luchman v. Puna* (1889) 16 Cal. 753, 16 I. A. 125.

(m) *Parthab Chunder v. Mohendranath* (1890) 17 Cal. 291, 16 I. A. 223.

(n) *Durga Chowdhurani v. Jewahir Singh* (1891) 18 Cal. 23, 30, 17 I. A. 122.

(o) *Durga Chowdhurani v. Jewahir Singh* (1891) 18 Cal. 23, 17 I. A. 122; *Ram Gopal v. Shamkhatoon* (1893) 20 Cal. 93, 19 I. A. 228; *Fa.*

Karim v. Maala Bakhsh (1891) 18 Cal. 448, 18 I. A. 67; *Ramratan v. Nanda* (1892) 19 Cal. 249, 19 I. A. 1; *Lukhi Narain v. Jodu Nath* (1894) 21 Cal. 505, 21 I. A. 36.

East India Ry. Co. v. Changanui (1915) 42 Cal. 888.

(p) *Ananganjanjari v. Tripura Sundari* (1887) 14 Cal. 740, 747, 14 I. A. 101; *Hemanta v. Brojendra* (1890) 17 Cal. 875, 17 I. A. 66; *Shirabasa v. Sangappa* (1905) 29 Bom. 1, 31, I. A. 154.

on the ground that the legal conclusion was erroneous. Thus where a suit involved a question of adverse possession, and it was held by the lower Courts that the proper legal conclusion to be drawn from the findings of fact in the case was that the defendant was in adverse possession, the Privy Council held that the correctness of this conclusion was a question open to second appeal, and that the High Court was not precluded from deciding to the contrary (*g*).

S. 100.

Second appeal where the decision is contrary to law.—A second appeal will lie where the decision is contrary to "law." The term "law" in cl. (a) is not limited in its meaning to statute law: it means general law (*r*).

When the question is one of *construction of a deed*, the question is one of law, and a second appeal will lie (*s*). But where a suit involves a question of adoption, and documents are produced as *evidence* of the fact of adoption, the question as to the effect to be given to the documents, that is, whether the documents do or do not support the alleged adoption, is a question of fact, and no second appeal will lie (*t*). Though a person may not have been duly appointed executor, he may render himself responsible as executor if he intermeddles with the estate of the deceased. Misapplication of law on this point is a good ground for a second appeal (*u*).

Usage having the force of law.—These words mean "a local or family usage as distinguished from the general law" (*r*).

Substantial error or defect in procedure.—Where secondary evidence was admitted in contravention of the provisions of the Evidence Act, s. 66, it was held that the case came within cl. (c), and that a second appeal would lie (*w*). On the same ground it was held that a second appeal would lie where an unregistered document was admitted in evidence (*x*). Similarly where the lower appellate Court proceeded to determine the appeal without waiting for the return of a commission issued by that Court, a second appeal was allowed (*y*).

Where the Court of first appeal disposed of a suit upon a case not raised by the parties or warranted by the evidence, the case is one of substantial error or defect of procedure, and a second appeal will lie (*z*). Omitting to decide a material issue (*a*), omitting to examine witnesses tendered (*b*), refusing to receive documentary evidence which ought to have been accepted (*c*), allowing the plaintiff in the lower appellate Court to change the nature of his suit (*d*), have all been held to be good grounds for a special appeal.

Pleas which may be taken for the first time in special appeal.—An appellant will not be allowed to set up for the first time in second appeal a plea not taken by him in the lower Court. But if the objection is one which goes to the very root of the case, it may be allowed to be taken for the first time in second appeal (*e*). Thus, subject to the provisions of s. 21 above, an objection to jurisdiction may be taken for the first time in special appeal, if it is patent on the face of the record (*f*). Similarly, the plea

- (*q*) *Lachmewar v. Manowar* (1892) 19 Cal. 253, 19 I. A. 48; *Ram Gopal v. Shamskhotan* (1893) 20 Cal. 93, 98, 19 I. A. 228.
(*r*) *Ram Gopal v. Shamskhotan* (1893) 20 Cal. 93, 99, 19 I. A. 228.
(*s*) *Fateh Chund v. Kishan Kumar* (1912) 71 All. 590, 39 I. A. 217.
(*t*) *Lachman Lal v. Kanikaya Lal* (1895) 22 Cal. 609, 22 I. A. 51.
(*u*) *Maniram Seth v. Seth Rupchond* (1906) 33 Cal. 1047, 33 I. A. 165.
(*v*) *Ram Gopal v. Shamskhotan* (1893) 20 Cal. 93, 19 I. A. 228.
(*w*) *Lachman Singh v. Puna* (1890) 16 Cal. 753, 16

- I. A. 125.
(*x*) *Basava v. Kalkujan* (1874) 2 Bom. 489; *Ramappa v. Umanna* (1883) 7 Bom. 123.
(*y*) *Mudho Singh v. Kashi Singh* (1894) 16 All. 342.
(*z*) *Shicabasa v. Sangapa* (1905) 29 Bom. 1, 31 I. A. 154.
(*a*) *Bankor v. Ganpartan* (1892) 16 Bom. 545.
(*b*) *Monilal v. Khirada* (1893) 20 Cal. 740.
(*c*) *Talewar Singh v. Bhagwan Das* (1908) 12 G. W. N. 312.
(*d*) *Terietput v. Sudersan Das* (1878) 4 Cal. 45.
(*e*) *Keppa v. Dorasami* (1883) 6 Mad. 76.
(*f*) *Sayad v. Nam* (1890) 13 Bom. 424; *Vetayudan v. Arumuchidra* (1890) 13 Mad. 273.

Ss. of *res judicata* may be taken for the first time in second appeal, provided it can be decided upon the record before the Court (g). So also the plea of want of notice in an ejectment suit (h). See notes to s. 21 above.

100-104.

Second appeal on no other grounds.

101. No second appeal shall lie except on the grounds mentioned in section 100.

102. No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.

No second appeal in certain suits.

Suits of the nature cognizable by Courts of Small Causes.—Whether a suit is or is not of the nature cognizable by a Court of Small Causes is to be determined by a reference to the provisions of the Act relating to Provincial Courts of Small Causes, being Act 9 of 1887. If a suit is of the nature cognizable by a Small Cause Court, and the value of the subject-matter of the suit does not exceed Rs. 500, no second appeal will lie.

103. In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal but not determined by the lower appellate Court.

Power of High Court to determine issues of fact.

Scope of the section.—This section empowers the High Court in second appeal to determine issues of fact in the circumstances specified in the section.

APPEALS FROM ORDERS.

104. (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders :—

Order from which appeal lies.

- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the Court ;
- (b) an order on an award stated in the form of a special case ;
- (c) an order modifying or correcting an award ;
- (d) an order filing or refusing to file an agreement to refer to arbitration ;

(g) *Kanahai Lal v. Suraj Kumar* (1899) 21 All. 416. | (h) *Dodhu v. Madhavrao* (1893) 18 Bom. 119.

- (e) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration ; Ss.
104, 105.
- (f) an order filing or refusing to file an award in an arbitration without the intervention of the Court ;
- (g) an order under section 95 :
- (h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree ;
- (i) any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under this section.

Appealable orders.—This section and O. 43, r. 1, contain a full list of appealable orders. As to cl. (i), see O. 43, r. 1.

Sub-s. (2).—A second appeal may lie from a *decree* (s. 100), but not from an *order*.

105. (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction ; but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

Scope of the section.—An interlocutory order made in a suit is either appealable (s. 104) or not appealable. This section applies both to appealable and non-appealable orders. Where an interlocutory order is appealable, the party against whom the order is made is not bound to prefer an appeal against it, but he may make the irregularity in the order a ground of objection in the appeal preferred from the *decree* in the suit in which the order was made. In other words, s. 105 allows an appealable order which has not been appealed from to be made the subject of appeal in an appeal against the final decree. There is no law prevailing in India which renders it imperative upon a party to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not do so, of forfeiting for ever the benefit of the

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consideration of the appellate Court. Nothing would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon a party the necessity of appealing, whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities. It was so observed by their Lordships of the Privy Council in *Moheshur Singh v. Bengal Government* (i) and subsequent cases (j), and it is this principle that underlies the present section. The present section makes it quite clear that an order appealable under s. 104 may be questioned under s. 105 in an appeal from the decree in the suit, although no appeal from the order has been preferred under s. 104. The only exception to this is as regards an order of remand made under O. 41, r. 23 [see sub-sec. 2].

Even where the interlocutory order is one from which no appeal lies, under s. 104, an error, defect or irregularity in that order may be set forth as a ground of objection in the memorandum of appeal, where an appeal is preferred from the decree in the suit in which the order was made.

Error, defect or irregularity.—The error, defect or irregularity referred to in this section must be an error, defect or irregularity in law or procedure, and not in matters of fact (k).

106. Where an appeal from any order is allowed, it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court.

What Court to hear appeals.

GENERAL PROVISIONS RELATING TO APPEALS.

107. (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power--

Lower or Appellate Court

- (a) to determine a case finally ;
- (b) to remand a case ;
- (c) to frame issues and refer them for trial ;
- (d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

See O. 41, rr. 23, 24, 25, 27 and 28.

(i) (1850) 7 M. I. A. 283.
(j) *Forbes v. Amersonnissa Begum* (1865) 10 M. I. A. 340; *Sheonath v. Raninath* (1865) 10 M.

I. A. 411; *Shukla Mukhun Lall v. Sree Kishan Singh* (1869) 12 M. I. A. 157.
(k) *Sankari v. Murudhar* (1890) 12 All. 200.

108. The provisions of this part relating to appeals from original decrees shall, so far as may be, apply to appeals—

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108, 109.

Procedure in appeals from
appellate decrees and orders.

- (a) from appellate decrees, and
- (b) from orders made under this Code or under any special or local law in which a different procedure is not provided.

APPEALS TO THE KING IN COUNCIL.

109. Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council—

When appeals lie to King
in Council.

- (a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction :
- (b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction ; and
- (c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council.

Final order.—An appeal to the Privy Council under cls. (a) and (b) lies not only from a final *decree*, but also from a *final order*. A *final order* within the meaning of clauses (a) and (b) of the section is an order which *finally decides* any matter which is directly at issue in the case in respect to the rights of the parties. Thus an order refusing the appointment of a receiver in a suit is not a final order, for such an order does not determine the rights of the parties with regard to any of the matters in controversy in the suit, and, therefore, no appeal lies from such an order to the Privy Council (l). But where an order directing the taking of accounts, which the defendant contends ought not to be taken at all, decides in effect that if the result should be found to be against the defendant, he is *liable* to pay the amount, the order is final within the meaning of this section (m). Similarly, an order under rules 90 and 92 of Order 21 setting aside or confirming a sale is appealable to His Majesty in Council. Such an order is clearly one which deals finally with the rights of parties, and there is no reason why it should be excluded from the privilege of an appeal; sub-sec. (2) of s. 104, which provides that no second appeal shall lie in the case of such an order [O. 43. cl. (1)], cannot restrict the provision of the present section which allows an appeal to the King in Council from final orders (n).

(l) *Chundi Dutt v. Pudmanund* (1895) 22 Cal. 528.

(m) *Rahimboy v. Turner* (1891) 15 Bom. 155, 15

f. A. 6.

(n) *Krishna Pershad v. Motiehand* (1913) 40 Cal. 335, 647-648, 40 I. A. 140, 148, 149.

Ss. 109, 110. An order of remand is not ordinarily capable of being the subject of an appeal to His Majesty in Council, being interlocutory and not being final within the meaning of this section, but it would be a final order and therefore capable of appeal if it has the effect of deciding finally the *cardinal* point in the suit (o).

Any other Court of final appellate jurisdiction.—An appeal may lie to the Privy Council from a final order of a District Judge passed in appeal under s. 104 [Code of 1882, s. 588]. The order being one passed in appeal by the District Court, no appeal lies to the High Court from such order [s. 104, sub-s. (2)], and the District Court is to that extent a Court of final appellate jurisdiction (p).

Prerogative of the Crown.—The Code does not limit the prerogative of the Crown to admit an appeal. Hence special leave may be granted to appeal where leave has been refused by the High Court (g). But no special leave will as a rule be granted, unless there is some substantial question of law of general interest involved (i). See s. 112, cl. (a).

Certificate as to fitness.—Where a case is certified to be a fit one for appeal to His Majesty in Council [O. 43, rr. 3 and 6], it is not necessary that the order should be a *final* one. Nor is it necessary that the value of the subject-matter of the suit should be Rs. 10,000 or upwards [s. 110] (s). The only condition necessary is that the case should be a fit one for appeal to the Privy Council. Thus where an application was made by a Company for a certificate to appeal to the Privy Council on the ground that the financial and commercial position of the Company might be seriously affected by the questions at issue, and that those questions were of importance to Indian Companies generally, the High Court of Bombay granted the requisite certificate. The order sought to be appealed from in that case was an order dismissing a petition presented by the Company for a confirmation of a special resolution altering the memorandum of association of the Company (t). Similarly when a case involved a substantial question of law, and the point in dispute, though not measurable by money, was of considerable importance, namely, the *extent* of the control acquired by one who had built a fire-temple for Parasat Udwada, the High Court of Bombay granted leave to appeal to the Privy Council (u). In fact what is contemplated in cl. (c) is a class of cases in which there may be involved questions of public importance, or which may be important precedents governing numerous other cases, or in which while the right in dispute is not exactly measurable in money, it is of great public or private importance (r).

✓ **110.** In each of the cases mentioned in clauses (a) and (b) of section 109, the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject-

- (o) *Radha Kishan v. Collector of Jaunpur* (1901) 23 All. 220, 28 I. A. 28; *Muzhar Hossain v. Bodha* (1895) 17 All. 112, 22 I. A. 1; *Ananda Gopal v. Naffor Chandra* (1908) 33 Cal. 618; *Nuri Miah v. Ganges Sugar Works* (1916) 38 All. 150 [F. B.]; *Venkataranga v. Narasimha* (1913) 38 Mad. 509.
(p) *Saadatmand v. Phul Kuar* (1898) 20 All. 412, 25 I. A. 146.
(q) *Rahimbhoy v. Turner* (1891) 15 Bom. 155, 18 I. A. 6.

- (r) *Moti Chand v. Ganja Prasad* (1902) 24 All. 174, 29 I. A. 40; *Sadagopa v. Krishnamoorthy Rao* (1907) 30 Mad. 185, at p. 188, 34 I. A. 93, at p. 99.
(s) *Rahmubhoy v. Turner* (1890) 14 Bom. 428.
(t) *Bombay Burmah Trading Corporation v. Dorabji* (1903) 27 Bom. 415.
(u) *Navroji v. Kharsedji* (1904) 6 Bom. L. R. 286, on appeal from (1904) 28 Bom. 20.
(v) *Hirjibhai v. Jameetji* (1913) 15 Bom. L. R. 1021, at p. 1033.

matter in dispute on appeal to His Majesty in Council must be the same sum or upwards. S. 110.

or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value.

and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.

Read with this section O. 15, n. 4 and 5.

Value of the subject-matter of the suit in the Court of first instance.—

This means the selling or market value and not the value as deduced from the amount of the stamp upon the plaint. Hence it is a suit for possession of immoveable property the value of the property as laid in the plaint is under Rs. 10,000 for the purpose of court fees, it is open to the plaintiff to show, when applying for a certificate for leave to appeal to the Privy Council, that the market value of the property was Rs. 10,000 or upwards (w).

Amount or value of subject-matter of suit and of subject-matter in dispute on appeal to the Privy Council.—Not only the amount or value of the subject-matter in dispute on appeal to the King in Council, but the amount or value of the subject-matter of the suit in the Court of first instance, must be Rs. 10,000 or upwards. The word "and" in the first clause of the section cannot be read as "or" (x). It is obvious that though the amount of the subject-matter in dispute on appeal to the King in Council may be Rs. 10,000 or upwards, the amount of the subject-matter of the suit in the Court of first instance may be less than Rs. 10,000. The words "amount or value of the subject-matter in dispute on appeal to His Majesty in Council" mean the amount or value at the date of the petition for leave to appeal to His Majesty in Council. The words "amount or value of the subject-matter of the suit in the Court of first instance" have given rise to some difficulty in cases where the decree awards interest or mesne profits. The question that arises in such cases is whether in calculating the appealable value of Rs. 10,000, we are to add interest or mesne profits up to (1) the date of the institution of the suit, or (2) the date of the decree, or (3) the date of the petition for leave to appeal to the Privy Council. In *Moti Chand v. Ganga Prasad* (y), the Court of first instance passed a decree for the plaintiff for principal and interest up to the date of the decree amounting to Rs. 9,496, with further interest at As. 8 per cent. up to the date of realization. From this decree the defendant appealed to the High Court, and that Court reversed the decree and dismissed the suit with costs. The plaintiff then applied for leave to appeal to the Privy Council, but the High Court refused the application on the ground that the claim and decree in the original Court were for less than Rs. 10,000. The plaintiff then applied to the King in Council for special leave to appeal, but the application was refused. In the course of the judgment their Lordships of the Privy Council said: "In the present case the amount or value of the subject-matter of the suit in the Court of first instance, construing that in the manner most

(w) *Mohun Lall v. Behee Doss* (1860) 7 M. I. A. 428; *Lekraj Roy v. Kankya Singh* (1874) 1 I. A. 317; *Gourmoy v. Abdul* (1860) 8 M. I. A. 208.
(x) *Moti Chand v. Ganga Prasad* (1902) 24 All. 174 20 I. A. 40.
(y) (1902) 24 All. 174, 29 J. A. 10.

§ 110 *favourable to the proposed appellant, was at the outside* the amount for which he recovered his decree which was below Rs. 10,000, amounting in round numbers, I think, to about Rs. 9,500." It is conceived that the words "construing that in the manner most favourable to the proposed appellant" mean "even by including interest subsequent to the suit and up to the decree." It is not clear from the judgment of their Lordships whether interest subsequent to the date of the suit can be added to the principal in calculating the appealable value of Rs. 10,000. But this decision is certainly an authority for the proposition that interest subsequent to the decree cannot be added in calculating the specified amount of Rs. 10,000 (-). In a recent case the High Court of Madras held that in calculating the appealable value of Rs. 10,000, mesne profits *only up to the date of the institution of the suit* can be added to the value of the property of which the possession is claimed (a). This decision proceeded on the assumption that what the Privy Council held in the above case was that interest only up to the date of the suit can be added to the principal. It is well established that the costs of suit cannot be added to the principal in calculating the appealable value of Rs. 10,000 (b).

A mortgages his property to B. C claims that a portion of the property of the value of about Rs. 6,000 belongs to him, and did not belong to A. B then sues A on the mortgage, the mortgage-debt being Rs. 38,000, and joins C as a party to the suit. A decree is passed for A on the mortgage. C's claim is allowed in fact by the Court of first instance, but it is disallowed altogether by the High Court. Is C entitled to appeal to the King in Council? No, because though the amount of the decree passed in favour of A exceeds Rs. 10,000, the value of C's claim is less than Rs. 10,000 (c). Note that C ought not to have been joined as a party to the suit at all.

It must be noted that the point of time to be considered as to the value of the property under this section is not the date of the institution of the suit, but the date of the decree from which the appeal to the Privy Council is to be made (d).

Or the decree must involve, directly or indirectly, some claim or question to property of the value of Rs. 10,000 or upwards.—It must be noted that the expression used in the second paragraph of this section is "property," while that used in the first paragraph is "subject-matter of the suit," and "subject-matter in dispute on appeal to His Majesty in Council." Where the value of the property in suit was below Rs. 10,000, but the effect of a deed of gift, with regard to the construction of which there was a dispute, would govern the ownership of property, worth five lakhs, a certificate of appeal was granted (e). Similarly, where the value of the subject-matter in dispute on appeal to His Majesty in Council was below Rs. 10,000, but the proposed appeal to His Majesty in Council involved a decision as to the validity of an award which dealt with property worth over Rs. 10,000, a certificate of appeal was granted (f).

A sues B for partition of property of a value exceeding Rs. 10,000. The share claimed by A is of a value less than Rs. 10,000. Can it be said in such a case that the decree involves some claim or question to property of a value exceeding Rs. 10,000. Yes, according to the Calcutta High Court (g); no, according to the Bombay High Court,

(2) The decision in *Dalglish v. Dinnadar* (1906) 33 Cal. 1286, 1, is submitted, erroneous. See *Nand Kishore v. Ram Gulam* (1912) 39 Cal. 1937, 1940.

(a) *Subramania v. Sathumal* (1916) 39 Mad. 843.

(b) *Deoga Doss v. Ramanuvth Chowdry* (1899) 8 M. L. A. 202.

(c) *Radh Kinnar v. Roli Singh* (1916) 38 All. 488, 43 I. A. 147.

(d) *Surendranath v. Dwarka Nath* (1917) 41 Cal. 119.

(e) *Aliman v. Masiba* (1896) 1 Cal. W. N. 1000.

(f) *Sri Kishan v. Kashmira* (1913) 35 All. 445. See also *Khuga Muhammad*, in the matter of (1899) 18 All. 196.

(g) *Lala Bhugua v. Rai Parshupati* (1906) 10 C. W. N. 561.

unless there be other property outside the subject-matter in dispute which can be affected by the decision (h)

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110-112.

Affirms the decision of the Court immediately below.—It is not enough where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree, that the appeal involves some substantial question of law; it is further necessary that the amount of the subject-matter of the suit and of the subject-matter in dispute on appeal must be Rs. 10,000 or upwards, or that the decree must involve some claim to property of like amount. The existence of a question of law of itself does not give a right of appeal in the ordinary course of procedure under this section (i). This is clear from the word “and” with which the last paragraph of this section begins

The appeal must involve some substantial question of law.—No appeal lies to the Privy Council from an appellate decree, when there are concurrent findings of the Appellate Court and of the Court below upon questions of fact, and when upon such findings no substantial question of law arises (j). To grant leave to appeal on the ground that “there seems to be a point of law which however has not been argued here,” is not in compliance with the provisions of this section (l)

111. Notwithstanding anything contained in section 109, no appeal shall lie to His Majesty in Council—

- Bar of certain appeals
- (a) from the decree or order of one Judge of a High Court established under the Indian High Courts Act, 1861, or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court, where such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the High Court at the time being; or
 - (b) from any decree from which under section 102 no second appeal lies.

Saving

112. (1) Nothing contained in this Code shall be deemed—

- (a) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever,
- or

(h) *De Silva v. De Silva* (1904) 6 Bom. L. R. 403.
(i) *Banarsi Prasad v. Kashu Krishna* (1906) 23 All. 227, 23 I. A. 11; *Radha Krishna Das v. Rai Krishna Chandra* (1901) 23 All. 415, 23 I. A. 132

(j) *Tuli Persad v. Benayek* (1896) 23 Cal. 913, 23 I. A. 192.
(k) *Karuppanan v. Srinivasan* (1902) 25 Mad. 215, 29 I. A. 38

- . 112. (b) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee.

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts

PART VIII.

Reference, Review and Revision.

113. Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit.

Reference to High Court.

See notes to O. 40, r. 1, below.

✓ **114.** Subject as aforesaid, any person considering himself aggrieved—

Review.

(a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred.

(b) by a decree or order from which no appeal is allowed by this Code, or

(c) by a decision on a reference from a Court of Small Causes,

may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

See notes to O. 47, r. 1, below

✓ **115.** The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

Revision

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit.

115. **Revisional Jurisdiction.**—The jurisdiction exercised by the High Court under this section is called Revisional Jurisdiction.

When revisional jurisdiction may be exercised.—The powers of the High Court under this section can only be invoked in cases in which no appeal lies to the High Court, provided the case has been decided by any Court subordinate to such High Court, and the subordinate Court appears—

- (1) to have exercised a jurisdiction not vested in it by law, or
- (2) to have failed to exercise a jurisdiction vested in it by law, or
- (3) to have acted in the exercise of its jurisdiction illegally or with material irregularity.

The High Court has no power to interfere in revision under this section except in one or other of the three cases mentioned in the section. Whether a particular order is *expedient or not* is not a ground on which the High Court can interfere under this section (l).

High Court's powers of revision.—In the exercise of revisional powers it is not the duty of the High Court to enter into the merits of the evidence; it has only to see whether the requirements of the law have been duly and properly obeyed by the Court whose order is the subject of revision and whether the irregularity as to failure or exercise of jurisdiction is such as to justify interference with the order (m). If the High Court finds that the external conditions of jurisdiction, of investigation and of command have been satisfied by the inferior Court, it will not substitute its own appreciation of evidence, or its own judgment thereon, for the determination of the inferior Court, in any matter committed by the Legislature to the discretion of the inferior Court (n).

Where no appeal lies.—The High Court cannot act under this section in any case in which an appeal lies. The word “appeal” is not confined to a first appeal; it includes a second appeal. Hence there can be no revision where a second appeal lies (o). Where no appeal lies, but an appeal is perfected, the Court may, in a proper case, treat the appeal as an application for revision, and deal with it on that footing (p).

Interlocutory orders.—Since there can be no revision where an appeal lies, there can be no revision of these interlocutory orders that are appealable under s. 104. As regards interlocutory orders that are not appealable under s. 104, there is a conflict of decisions as to whether they are open to revision under this section (q).

Where other remedies open.—The powers conferred upon the High Court by this section are *discretionary*. Hence though a party may not have a remedy by way of appeal, the High Court may, in the exercise of its discretion, refuse to interfere under this section if there is any other remedy open to the party. But that remedy must be a *certain and conclusive* remedy. If the remedy is a *doubtful* one, the High Court may interfere by way of revision under this section (r). And even though the remedy may be certain and conclusive, the High Court may in *exceptional cases* interfere by way of revision under this section (s).

(l) *Naval Singh*, in the matter of the petition of (1912) 34 All. 393.

(m) *Muhammad v. Ajudhia* (1888) 10 All. 467.

(n) *Shiva v. Joma* (1883) 7 Bom. 341.

(o) *Tirupati v. Vasiam* (1897) 20 Mad. 155.

(p) *Merali v. Sheriff* (1911) 36 Bom. 105, 107.

Baikanta Nath v. Sita Nath (1911) 38 Cal. 421, 424.

(q) *Bai Abrani v. Deepsing* (1915) 40 Bom. 86 90-91.

(r) *Ghulam v. Dwarka Prasad* (1896) 18 All. 163, 168.

(s) *Debi Das v. Ejaz Husain* (1906) 28 All. 72; *Shree Krishna Dass v. Chandook* (1909) 32 Mad. 334.

Exercise by Court of Jurisdiction not vested in it by law.—Thus if a Court assumes a jurisdiction which, by reason of the *pecuniary* or *territorial* limits of the jurisdiction of such Court or by reason of the *subject-matter* of the suit or other proceeding instituted in it, is not vested in it by law, the High Court to which such Court is subordinate may exercise its revisional powers under this section. S. 115.

Failure to exercise jurisdiction.—Where a Court, having jurisdiction to act in a matter, declines jurisdiction in the matter, this section will apply. Thus where a Court has jurisdiction to accept a plaint (*f*) or to execute a decree (*u*), or to review its judgment (*v*), but refuses to accept the plaint or to execute the decree or to review its judgment on the ground that it has no jurisdiction, the High Court will interfere under this section. Similarly where a Court refused the application of a decree-holder for a rateable distribution under s. 73, though according to its own finding he was clearly entitled to such distribution, on the ground that there was other property of the judgment-debtor available for the satisfaction of his claim, the High Court of Madras interfered under this section. (*w*).

Where a Court in the exercise of its jurisdiction has acted illegally or with material irregularity.—This part of the section contemplates cases other than those referred to previously in the same section, namely, where the Court has either exercised a jurisdiction not vested in it, or refused to exercise a jurisdiction vested in it. It is intended to refer to the class of cases where the Court *having jurisdiction and exercising it* appears to have acted illegally or with material irregularity in the exercise of such jurisdiction. *It is settled law that where a Court has jurisdiction to determine a question, and it has determined that question, it cannot be said to have acted illegally or with material irregularity because it has come to an erroneous decision.* The leading case on the subject is that of *Amin Hassan Khan v. Shao Buksh Singh* (*x*), decided by their Lordships of the Privy Council in the year 1884. In that case it was laid down by their Lordships that where a Court *has* jurisdiction to decide the question before it and in fact decides such question, it cannot be regarded as acting in the exercise of its jurisdiction illegally or with material irregularity, *merely because its decision is erroneous.* The mere fact that the decision of the Court is wrong affords no ground for the interference of the High Court under this section. Following this decision, it has been held that the High Court will not interfere under this section, merely because the lower Court wrongly decided that the suit was barred by limitation (*y*), or that it was barred as *res judicata* (*z*) or because the lower Court proceeded upon an erroneous construction of the sections of an Act (*a*), or misunderstood the effect of a document in evidence (*b*), or excluded evidence which it ought to have admitted (*c*).

The following are additional cases on the third branch of the section :—

- (1) To frame an issue on a point of fact expressly *admitted* by the defendant and to dismiss the suit on the ground that that fact is not proved, is an “illegality” within the meaning of this section (*d*).

- | | |
|--|---|
| <p>(<i>l</i>) <i>Zamran v. Fateh Ali</i> (1905) 32 Cal. 146.
 (<i>u</i>) <i>Shamray v. Nitaji</i> (1886) 10 Bom. 200.
 (<i>v</i>) <i>Akbar Khan v. Muhammad</i> (1899) 31 All. 610.
 (<i>w</i>) <i>Sree Krishna Doss v. Chandook Chand</i> (1909) 32 Mad. 334.
 (<i>x</i>) (1889) 11 Cal. 6, 11 I. A. 237; <i>Muhammad Yusuf Khan v. Abdul Rahman Khan</i> (1889) 10 Cal. 740, 10 I. A. 104.
 (<i>y</i>) <i>Sunder Singh v. Doru Shankar</i> (1898) 20 All. 78; <i>Ramgopal v. Joharmall</i> (1912) 39 Cal. 473.</p> | <p>(<i>z</i>) <i>Amritnath v. Bullrishna</i> (1887) 11 Bom. 488.
 (<i>a</i>) <i>Kali Charan v. Sarat Chunder</i> (1903) 30 Cal. 397; <i>Gunga Charan v. Shashi Bhushan</i> (1905) 32 Cal. 572; <i>Ram Singh v. Sahig Ram</i> (1906) 28 All. 84.
 (<i>b</i>) <i>Dasmath Rai v. Shoodin</i> (1894) 16 All. 89.
 (<i>c</i>) <i>Mudharay v. Gulabhat</i> (1899) 23 Bom. 177; <i>Enat Mondul v. Balaram</i> (1898) 3 Cal. W. N. 681.
 (<i>d</i>) <i>G. Akh v. Pithal</i> (1887) 11 Bom. 435.</p> |
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S. 115.

- (2) It has an "illegality," if a Court passes a decree on an unstamped hundi. The Stamp Act expressly provides that an unstamped hundi *shall* not be acted upon (e). See Stamp Act II of 1899, s. 35.
- (3) It is an "illegality" and a "material irregularity" to make an order against a person without hearing him at all. "It is an elementary principle of law that no order can be passed against a person without allowing him to be heard and to adduce evidence in his defence" (f).
- (4) It is "material irregularity" on the part of a Court to refuse to draw up its own decree, whether it be preliminary or final (g).
- (5) It is a material irregularity to apply to a case a section of an Act which is not applicable to the case (h).
- (6) It is an illegality to pass a decree where there is *no evidence* at all to support it (i).

It has been recently held by a Full Bench of the Madras High Court that the High Court has jurisdiction to interfere under this section where an *appellate Court* erroneously decides in the exercise of its admitted jurisdiction as an appellate Court that the Court of first instance had or had not jurisdiction to entertain a suit (j).

Gross miscarriage of justice.—The interference of the High Court under this section in cases where the lower Court has acted illegally or with material irregularity should be confined to cases where the illegality or irregularity was such as had occasioned or might occasion a substantial failure of justice (k). Hence the judgment of a lower Court should not be set aside upon a mere technicality (l).

(e) *Chenbasappa v. Lakshman* (1894) 18 Bom. 369.
 (f) *Sato Koer v. Gopal Sohu* (1907) 34 Cal. 929, 933.
 (g) *Sidhanath v. Ganesh* (1912) 37 Bom. 60.
 (h) *Sew Bux v. Shib Chunder* (1886) 13 Cal. 225;
Jugshundho v. Jadu (1887) 15 Cal. 47;
Sivaprasad v. Tricomdas (1915) 42 Cal.
 926, 931.

(i) *Shields v. Wilkinson* (1887) 9 All. 398, 400.
 (j) *Vuppaburi v. Kanchumarti* (1916) 39 Mad.
 195.
 (k) *Jamatji v. Macleod* (1907) 31 Bom. 138.
 (l) *Asharfi Lal v. Deputy Commissioner of B...*
Banji (1896) 22 Cal. 729, 22 I. A. 90.

PART IX.

Special Provisions relating to the Chartered High Courts.

116. This Part applies only to High Courts which are
Part to apply only to certain High Courts. or may hereafter be established under the Indian High Courts Act, 1861.

117. Save as provided in this Part or in Part X or in
Application of Code to High Courts. rules, the provisions of this Code shall apply to such High Courts.

118. Where any such High Court considers it necessary
Execution of decrees before ascertainment of costs. that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs ;

and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

119. Nothing in this Code shall be deemed to authorize
Unauthorized persons not to address Court. any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys.

120. The following provisions shall not apply to the
Provisions not applicable to High Courts in original civil or insolvent jurisdiction. High Court in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20.

As to *Rule* not applicable to Chartered High Courts, see O. 49, r. 3.

PART X.

Rules.

121. The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part.

Effect of rules in First Schedule.

122. High Courts established under the Indian High Courts Act, 1861, and the Chief Courts of the Punjab and Lower Burma, may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule.

Power of certain High Courts to make rules.

123. (1) A Committee, to be called the Rule Committee, shall be constituted at each of the towns of Calcutta, Madras, Bombay, Allahabad, Lahore and Rangoon.

Constitution of Rule Committees in certain provinces.

(2) Each such Committee shall consist of the following persons, namely :—

- (a) three judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge, or (in the Punjab or Burma) a Divisional Judge for three years,
- (b) a barrister practising in that Court,
- (c) an advocate (not being a barrister) or vakil or pleader enrolled in that Court.
- (d) a judge of a Civil Court subordinate to the High Court, and
- (e) in the towns of Calcutta, Madras and Bombay an attorney.

(3) The members of each such Committee shall be appointed by the Chief Justice or Chief Judge, who shall also nominate one of their number to be president : Ss.
123-125.

Provided that, if the Chief Justice or Chief Judge elects to be himself a member of a Committee, the number of other Judges appointed to be members shall be two, and the Chief Justice or Chief Judge shall be the President of the Committee.

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the Chief Justice or Chief Judge in this behalf ; and whenever any member retires, resigns, dies or ceases to reside in the province in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said Chief Justice or Chief Judge may appoint another person to be a member in his stead.

(5) There shall be a Secretary to each such Committee, who shall be appointed by the Chief Justice or Chief Judge and shall receive such remuneration as may be provided in this behalf by the Governor-General in Council or by the Local Government, as the case may be.

124. Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the First Schedule or to make new rules, and before making any rules under section 122 the High Court shall take such report into consideration.

Committee to report to High Court

The provision as to Rule Committees apply only to Chartered High Courts and the Chief Courts of the Punjab and Lower Burma. In the case of Chartered High Courts and Chief Courts, Rules can only be made after those Courts have taken the opinion of the Rule Committee attached to those Courts. In the case of other High Courts power has been given to appoint such Rule Committees as the Governor-General in Council may determine (see s. 125).

125. High Courts, other than the Courts specified in section 122, may exercise the powers conferred by that section in such manner and subject to such conditions as the Governor-General in Council may determine :

Power of other High Courts to make rules

Ss.
125-128.

Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court.

The rules to be made under this section and s. 122 should not be inconsistent with the provisions of the body of this Code. See s. 128, and contrast s. 129.

✕ **126.** Rules made under the foregoing provisions shall be subject to the previous sanction of the following authorities namely :—

Rules subject to sanction.

- (a) if the rule is made by a High Court established under the Indian High Courts Act, 1861, to the sanction of the authority prescribed by section 15 of that Act for rules made under that section ;
- (b) if the rule is made by any other High Court, to the sanction of the Local Government.

Sanction.—This section requires, in the case of rules to be made by Chartered High Courts, the same sanction as is required by section 15 of the Indian High Courts Act, 1861, now the Government of India Act, 1915, s. 107, the object being that the rule-making power should correspond with the power conferred under section 15 of that Act. That section empowers the Chartered High Courts to make and issue general rules for regulating the practice and proceedings, etc., of Courts subject to its appellate jurisdiction, subject to the previous sanction, in Bengal, of the Governor-General in Council, and in the Madras and Bombay Presidencies, of the Governor in Council of the respective Presidencies.

127. Rules so made and sanctioned shall be published in the *Gazette of India* or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule.

Publication of rules.

128. (1) Such rules shall be not inconsistent with the provisions in the body of this Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts.

Matters for which rules may provide.

(2) In particular, and without prejudice to the generality of the powers conferred by sub-section (1), such rules may provide for all or any of the following matters, namely : — S. 128.

- (a) the service of summonses, notices and other process by post or in any other manner either generally or in any specified areas, and the proof of such service :
- (b) the maintenance and custody, while under attachment. of live-stock and other moveable property, the fees payable for such maintenance and custody. the sale of such live-stock and property and the proceeds of such sale :
- (c) procedure in suits by way of counter-claim, and the valuation of such suits for the purposes of jurisdiction ;
- (d) procedure in garnishee and charging orders either in addition to, or in substitution for. the attachment and sale of debts :
- (e) procedure where the defendant claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not :
- (f) summary procedure—
 - (i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant. with or without interest, arising—
 - on a contract. express or implied : or
 - on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty ; or
 - on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only : or
 - on a trust : or
 - (ii) in suits for the recovery of immoveable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has

Ss.
128-131.

expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant ;

- (g) procedure by way of originating summons ;
- (h) consolidation of suits, appeals and other proceedings;
- (i) delegation to any Registrar, Prothonotary or Master or other official of the Court of any judicial, quasi-judicial and non-judicial duties ; and
- (j) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of Civil Courts.

129. Notwithstanding anything in this Code. any High Court established under the Indian High Courts Act, 1861, may make such rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.

Power of Chartered High Courts to make rules as to their original civil procedure.

Rules as to original civil procedure of Chartered High Courts.—Rules made under ss. 122 and 125 must not be inconsistent with the provisions in the body of this Code. Under this section, however, any Chartered High Court may make rules though they may not be consistent with the provisions of the Code, provided they are not inconsistent with the Letters Patent establishing it. Such rules, however, must relate only to procedure in the exercise of the *original civil* jurisdiction of those Courts.

130. A High Court not established under the Indian High Courts Act, 1861, may, with the previous sanction of the local Government, make with respect to any matter other than procedure, any rule which any High Court so established might, under section 15 of that Act. make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency-town.

Power of other High Courts to make rules as to matters other than procedure.

131. Rules made in accordance with section 129 or section 130 shall be published in the *Gazette of India* or in the local official Gazette. as the case may be, and shall from the date of publication or from such other date as may be specified have the force of law.

Publication of Rules.

PART XI.

Miscellaneous

132. (1) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court.

Exemption of certain women from personal appearance.

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code.

133. (1) The Local Government may, by notification in the local official Gazette, exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption.


Exemption of other persons.

(2) The names and residences of the persons so exempted shall, from time to time, be forwarded to the High Court by the Local Government and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such subordinate Court.

(3) Where any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs.

134. The provisions of sections 55, 57 and 59 shall apply, so far as may be, to all persons arrested under this Code.

Arrest other than in execution of decree.

 **135.** (1) No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court.

Exemption from arrest under civil process

(2) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such

- S. 135. jurisdiction, the parties thereto, their pleaders, mukhtars, revenue agents, and recognized agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process other than process issued by such tribunal for contempt of Court while going to or attending such tribunal for the purpose of such matter. and while returning from such tribunal.

(3) Nothing in sub-section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for immediate execution or where such judgment-debtor attends to show cause why he should not be committed to prison in execution of a decree.

While going to or attending and while returning from Court.—A party to a suit is exempt from arrest under this section while going to or attending the Court before which the suit is pending, and while returning from such Court. The following are the leading cases bearing on this part of the section :—

(1) Where a plaintiff who was a native of Patna, and who had instituted a suit in the High Court of Madras, left Patna on receiving a letter from his solicitors that his presence was required, and arrived at Madras on 24th October, and the suit having come on for hearing on the 27th of October was adjourned till the 25th of December, and he was arrested in execution of a decree against him on the 10th of November, it was held by the High Court of Madras that he was privileged from arrest (*m*). It is difficult to conceive how it can be said of the plaintiff in this case that he was going to, or attending, or returning from *the Court* at the time of his arrest. This decision has been disapproved by the Allahabad High Court (*n*).

(2) A, residing in Bombay, goes to Benares to prosecute an application to set aside an *ex parte* decree passed against him by the Benares Court, and puts up at a *Dāk* bungalow in Benares. On the date fixed for the hearing of the application, A attends the Court, when his application is heard and dismissed. He then leaves the Court, returns to the *Dāk* bungalow, and thence proceeds to the railway station where he is arrested while actually seated in the train in execution of the *ex parte* decree. It is found on evidence that A had taken a ticket for Allahabad when arrested. On the above facts the High Court of Allahabad held that A's arrest was legal. The Court said : " In the present case [A] had left the Court and had returned to the place where [he] was staying in Benares ; he had then left that place and [was] actually on his way to Allahabad *which is not his home*. In these circumstances we cannot hold that he, at the time of arrest, was *returning from a tribunal within the meaning of section 135* " (*o*).

(3) The exemption from arrest continues during such period as is reasonably occupied in going to, attending at, and returning from, the place of trial (*p*). But if there is a deviation, the privilege is forfeited. It is not a deviation sufficient to forfeit the privilege if the shortest road home is deviated from, and a less crowded and more convenient road adopted (*q*).

(*m*) *Siva Bur.* in the matter of (1882) 4 Mad. 317.
(*n*) *Ardeschirji v. Kalyan Das* (1909) 32 All. 3, 6.
(*o*) *Ardeschirji v. Kalyandas* (1909) 32 All. 3.

(*p*) *Appasamy v. Govinen* (1869) 4 Mad. H. C. 146.
(*q*) *Soorndro Nath*, in the matter of (1880) 5 Cal. 106.

✓ **136.** (1) Where an application is made that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

Procedure where person to be arrested or property to be attached is outside district.

S. 136.

(2) The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment.

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or for satisfying and decree that may be passed against him by that Court, in either of which cases the Court making the arrest shall release him.

(4) Where a person to be arrested or moveable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal or at Madras or at Bombay, or of the Chief Court of Lower Burma, the copy of the warrant of arrest or of the order of attachment, and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras, Bombay or Rangoon, as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court.

Scope of the section.—Section 39 provides for the case of arrest and attachment in execution of decrees outside the local limits of the Court which passed the decree. The present section provides for the case of arrest and attachment under any provision of this Code not relating to the execution of decrees, when the person to be arrested or the

Ss. 136-139. property to be attached is situate *outside* the local limits of the Court to which the application for arrest or attachment is made. Note the words "under any provision of this Code *not relating to the execution of decrees*" in sub-s. (1).

137. (1) The language which, on the commencement of this Code, is the language of any Court subordinate to a High Court shall continue to be the language of such subordinate Court until the Local Government otherwise directs.

Language of subordinate Courts.

(2) The Local Government may declare what shall be the language of any such Court and in what character applications to and proceedings in such Court shall be written.

(3) Where this Code requires or allows anything other than the recording of evidence to be done in writing in any such Court, such writing may be in English; but if any party or his pleader is unacquainted with English, a translation into the language of the Court shall, at his request, be supplied to him; and the Court shall make such order as it thinks fit in respect of the payment of the costs of such translation.

138. (1) The Local Government may, by notification in the local official Gazette, direct with respect to any Judge specified in the notification or falling under a description set forth therein, that evidence in cases in which an appeal is allowed shall be taken down by him in the English language and in manner prescribed.

Power for Local Government to require evidence to be recorded in English.

(2) Where a Judge is prevented by any sufficient reason from complying with a direction under sub-section (1), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court.

139. In the case of any affidavit under this Code—

Oath on affidavit by whom to be administered.

(a) any Court or Magistrate, or

(b) any officer or other person whom a High Court may appoint in this behalf, or

(c) any officer appointed by any other Court which the Local Government has generally or specially empowered in this behalf,

may administer the oath to the deponent.

140. (1) In any Admiralty or Vice-Admiralty cause of salvage, towage or collision, the Court, Ss. 140, 141.
Assessors in causes of salvage, &c. whether it be exercising its original or its appellate jurisdiction, may, if it thinks fit, and shall, upon request of either party to such cause, summon to its assistance, in such manner as it may direct or as may be prescribed, two competent assessors; and such assessors shall attend and assist accordingly.

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be prescribed.

141. The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.
Miscellaneous proceedings.

This section does not apply to proceedings in execution.—The procedure provide in the Code in regard to suits does not apply to applications for execution of decrees. The following are some of the instances:—

1. The provisions of s. 11 relating to *res judicata* in regard to suits do not apply to applications for the execution of decrees. But though these provisions do not in terms apply to applications for execution, such applications are governed by principles analogous to those of *res judicata*.

2. The provisions of O. 2, r. 2, do not apply to applications for execution. Hence where a decree awards two distinct reliefs, an application to enforce one relief is no bar to a subsequent application to enforce the other relief, though both reliefs are awarded by the same decree (i).

3. The provisions of O. 23, r. 1, do not apply to applications for execution. Hence the withdrawal of an application, though it be without the leave of the Court, is no bar to a fresh application for execution (s). See now O. 23, r. 4.

"Proceedings in any Court of civil Jurisdiction."—The proceedings spoken of in this section refer to *original* matters in the nature of suits, such as proceedings in probates, guardianships, and so forth, and do not include executions (t).

"The procedure provided in this Code."—This section extends the *procedure* provided in this Code in regard to suits to proceedings in civil Courts. It does not confer any *substantive right* upon any party to such proceedings not expressly given elsewhere by the Code, e.g., a right of appeal (s. 96) (u), nor does it confer upon any Court entertaining such proceedings a power not expressly given elsewhere by the Code, e.g., the power to refer questions to the High Court (s. 141) (v). Neither the right of appeal nor the power to refer questions to the High Court is a matter of *procedure*.

(r) *Radha v. Radha* (1891) 18 Cal. 515; *Sadho v. Hazal* (1897) 19 All. 98.
 (s) *Thakur Prasad v. Fakir-ullah* (1895) 17 All. 106, 22 I. A. 41.

(t) *Thakur Prasad v. Fakir-ullah* (1895) 17 All. 106, 111, 22 I. A. 44.
 (u) *Parasurama v. Seehier* (1903) 27 Mad. 504.
 (v) *Danodarna v. Kittappa* (1911) 36 Mad. 16.

Ss.
142-144.

142. All orders and notices served on or given to any person under the provisions of this Code shall be in writing.

Order, and notices to be
in writing

143. Postage, where chargeable on a notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed before the communication is made :

Postage.

Provided that the Local Government, with the previous sanction of the Governor-General in Council, may remit such postage, or fee, or both, or may prescribe a scale of court-fees to be levied in lieu thereof.

144. (1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed : and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

Restitution.—The doctrine of restitution contemplates the case where property has been received by a decree-holder in execution of a decree, and the decree or part thereof is subsequently varied or reversed on appeal by the judgment-debtor. In such a case, the procedure to be adopted by the judgment-debtor is to apply under this section to the Court of first instance for restitution of the property and for consequential relief. On such application being made, the Court *shall* cause restitution to be made to the judgment-debtor (the successful appellant). The restitution to be made must be such as will, so far as may be, place the parties in the position which they would have occupied but for the decree appealed from or such part thereof as has been varied or reversed (*w*). This principle applies with equal force whether restitution has or has not been directed in the appellate decree (*x*). For the purpose of making such restitution as aforesaid, the Court may make any orders, including orders for the refund of costs (*y*).

(w) *Hurrochunder v. Shoorodhoner* (1868) 9 W. R. 402.

(x) *Parbhu Dayal v. Ali Ahmad* (1909) 32 All. 79.
(y) *Watkins v. Mahomed* (1897) 1 Cal. N.W. 696.

and for the payment of interest (z), damages (a), compensation and mesne profits (b), which are properly consequential on such variation or reversal. In directing restitution it is to be noted that the parties must be placed in the same position as they were previously in irrespective of any other rights accruing to any of them during the litigation (c). Ss. 144, 145.

Illustrations.

(1) A obtains a decree against B for possession of immoveable property [or a decree for the recovery of moveable property, as timber, or a decree for a sum of money], and in execution of the decree obtains possession of the property [or receives the timber or recovers the money]. The decree is subsequently reversed in appeal. B is entitled on an application under this section to restitution of the property [or of the timber or of the money], though there may be no direction for restitution in the decree of the Appellate Court: *Munshi Dinesh Prashad v. Shankar* (1904) 9 Cal. W. N. 381; *Balvanirao v. Sadrudin* (1889) 13 Bom. 45; *Lihagwan v. Ummat-ul-Hasnain* (1896) 18 All. 262.

(2) A obtains a decree against B for Rs. 5,000, and recovers the amount in execution. The decree is subsequently reversed in appeal. B is entitled on an application under this section to a refund of the money together with interest up to the date of repayment, though the appellate decree may be silent as to interest.

(3) In execution of a decree obtained by A against B, certain property belonging to B is sold and it is purchased by C. The decree is subsequently reversed in appeal. Is B entitled to recover back the property from C? No, if C is a *bonâ fide* purchaser for value. Restitution cannot be obtained against a *bonâ fide* purchaser for value at an auction sale held by a Court which had jurisdiction to sell the property: *Piari Lal v. Hanif-un-nissa* (1910) 38 All. 240.

(4) A obtains a decree against B for possession of certain immoveable property and in execution of the decree obtains possession of the property. The decree is subsequently reversed in appeal. B is entitled to possession of the property together with *mesne profits* during the period of dispossession. If the property has in the meantime been let out by A to tenants, B is entitled to remove any tenant who refuses to vacate: *Rohni Singh v. Hodding* (1894) 21 Cal. 340. And it would seem that even if the property was transferred by way of sale by A, B would be entitled to possession even against the purchaser. The reason is that the rule that a *bonâ fide* purchaser at a sale held in execution of a decree which is subsequently reversed is not affected by the reversal, does not apply where the party seeking to be restored to possession has been wrongfully dispossessed by the agency of the Court: *Dorasami v. Annasami* (1900) 23 Mad. 306.

Sub-section (2): bar of suit.—This sub-section is new. It provides in express terms that where restitution could be obtained by *application* under this section, no separate suit should be brought in respect of it.

Enforcement of liability of surety.

✓ 145. Where any person has become liable as surety.—

(a) *Rodger v. Comptoir d'Escompte de Paris* (1871) L. R. 3 P. C. 405; *Forester v. Secretary of State* (1878) 3 Cal. 161, 173, 4 I. A. 137; *Collector of Ahmedabad v. Lurji* (1911) 35 Bom. 255 [Land Acquisition Act].

(a) *Balcantar v. Sadrudin* (1889) 13 Bom. 485.

(b) *Prag Narain v. Kamakhia Singh* (1909) 31 All. 551; *Parbhu Dayal v. Ali Ahmad* (1909) 32 All. 79.

(c) *Gunga Prasad v. Brojo Nath Das* (1908) 12 Cal. W. N. 642.

- S. 145. (a) for the performance of any decree or any part thereof, or
- (b) for the restitution of any property taken in execution of a decree, or
- (c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon.

the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47 :

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

Object of the section.—This section provides that where a person has become liable as surety for the performance of a decree or for any of the purposes specified in cls. (b) and (c), the party for whose benefit security has been given may enforce the security by *executing* the decree or order against the surety in the same manner as if the surety was a party to the decree or order and was directed by the decree or order to perform the obligation undertaken by him. But for the provisions of this section, a person for whose benefit security was given would have to bring a *regular suit* against the surety to enforce the security. The present section provides a summary remedy in *execution*, and dispenses with the necessity of a separate suit to the extent to which the surety has rendered himself *personally* liable. But if the surety takes upon himself more than a personal liability, and hypothecates immoveable property, the hypothecation can only be enforced by a regular suit (*d*).

Security for restitution of property taken in execution of a decree.
See O. 41, r. 6 ; O. 45, r. 13 (c).

Security for the payment of money.—See s. 55, sub-s. (4) ; O. 25, r. 1 ; O. 38, r. 2, 5 ; O. 41, r. 10 ; O. 45, r. 7.

Security for fulfilment of any condition imposed on any person.—Thus if a defendant produces promissory notes in Court and the plaintiff objects to their return to the defendant, but they are returned to him on *C* standing surety for their *production* when required, the plaintiff may, on non-production of the notes, proceed against *C* by *execution* under this section.

Notice to surety.—When a decree is sent by the Court which passed the decree to another Court for execution, the notice required by this section may be given by the latter Court (*e*).

(d) *Imir v. Mahadeo* (1917) 39 All. 225.

(e) *Takshminanker v. Raghmil* (1906) 29 Bom. 29.

This section does not bar a regular suit against a surety.—This section gives an *additional*, not an *exclusive*, remedy against a surety, and *does not prevent* the decree-holder from bringing a *regular suit* on the surety-bond to enforce the security (f). Ss. 145-148.

Death of defendant before hearing.—A sues B to recover Rs. 2,000 from B. On A's application B's property is attached before judgment. C stands surety for B, and the attachment is therefore removed. B dies before the hearing of the suit, and his widow is brought on the record as his representative. C then applies for his discharge as surety. B's death does not operate as a discharge of C from the suretyship (g).

146. Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

Proceedings by or against representatives.

147. In all suits to which any person under disability is a party, any consent or agreement as to any proceeding shall, if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement.

Consent or agreement by persons under disability. See the express leave of the court.

"Any person under disability."—The section applies to consent given on behalf of persons under disability, such as minors and lunatics.

"As to any proceeding."—These words do not refer to the *conduct* of a suit or appeal. A next friend or guardian *ad litem* has undoubtedly the *conduct* of a suit or appeal in his hands. But if he does anything in the action *beyond* the mere conduct of it, e.g., consents not to appeal, the person under disability is not bound by it unless it is done with the express leave of the Court (h).

148. Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

Enlargement of time.

"Act prescribed or allowed by this Code."—The present section applies only where a time is fixed for the doing of any act *prescribed or allowed by this Code*. See for instance, the following rules :-

1. O. 6, r. 18 (amendment of pleadings).
2. O. 7, r. 11 (b) [requiring plaintiff to correct valuation of suit].

(f) *Motilal v. Thakora* (1911) 36 Bom. 42. } 402.
 (g) *Chendulal v. Jeshangbhai* (1917) 41 Bom. } (h) *Rhodes v. Swithenbank* (1889) 22 Q. B. D. 577.

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3. O. 7, r. 11 (requiring plaintiff to supply requisite stamp paper, where the plaint is written upon paper insufficiently stamped).
4. O. 8, r. 9 (requiring written statement or additional written statement from a party).
5. O. 21, r. 17 (amendment of application for execution).

An application for extension of time fixed by the decree in a *redemption suit* for payment of the mortgage-debt does not fall under this section, but under O. 34, r. 8 (i).

Where an *ex parte* decree is set aside on condition that the defendant should pay a certain sum of money to the plaintiff within a certain time, and such payment is not made, the Court has power under this section to enlarge the time for such payment (j).

X 149. Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance.

Power to make up deficiency of court-fees.

Scope of the section.—This section is new. It is an enabling section. It empowers the Court to allow a party to make up the deficiency of court-fees payable on plaints, memoranda of appeal, applications for review of judgment, etc., even after the expiration of the period of limitation prescribed for the filing of these documents. The section enables a defective document to be *retrospectively* validated if the insufficiency of the stamp is subsequently made up with the leave of the Court. It must, however, be noted that the power to make up the deficiency of court-fees is *subject to the discretion of the Court* and is *not claimable as of right by a party* (k).

* 150. Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred.

Transfer of business.

✓ 151. Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

Saving of inherent powers of Court.

(i) *Hat Singh v. Tika Ram* (1912) 34 All. 388.
(j) *Jagannath v. Kamta Prasad* (1913) 35 All. 77.

(k) *Valli v. Mahmad* (1914) 16 Bom. L. R. 763, 796.

Inherent powers of Court.—The Code of Civil Procedure is not exhaustive (l). The Court has therefore in many cases, where the circumstances require it, acted upon the assumption of the possession of an *inherent* power to act *ex debito justitiæ*, and to do that real and substantial justice for the administration, for which alone it exists (m). The present section (which is new) expressly saves the inherent power of the Court. It does not, however, invest the Court with a jurisdiction over matters which are excluded from its cognizance. Thus a Court cannot under this section entertain a suit relating purely to caste questions, such a suit not being one of a civil nature (n): see s. 9 above. And, further, no order should be made under this section unless it is necessary for the ends of justice or to prevent abuse of the process of the Court (o). But where the ends of justice do require it, the Court has an inherent power to make such orders as it may deem proper. It has thus been held that, although the Code contains no express provision on the matters hereinafter mentioned, the Court has an inherent power,

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- (a) to consolidate suits and appeals (p);
- (b) to postpone the hearing of suits pending the decision of a selected action (p);
- (c) to stay on the ground of convenience cross-suits (p);
- (d) to add a party (g);
- (e) to allow a *defence in forma pauperis* (p);
- (f) to take cognizance of questions which cut at the root of the **subject-matter** of controversy between the parties, e.g., whether a deed of mortgage is attested as required by s. 59 of the Transfer of Property Act (r);
- (g) to set aside an order obtained by fraud practised upon the Court, e.g., when a pleader not engaged by the defendant at all, consents to a decree on behalf of the defendant (s);
- (h) to rehear a matter before the order passed by the Court at a previous hearing is drawn up and sealed (t).

Prevent abuse of process of Court.—A Court has inherent jurisdiction to stay any suit which is an abuse of the process of the Court (u).

152. Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties.

Amendment of judgments,
decrees or orders.

Amendment of decrees and orders.—There are two and only two cases in which the Court can amend or vary a decree or order after it is drawn up and signed, namely:—

- (i) under its *inherent powers*, when the decree or order does not correctly state what the Court actually decided and intended; and

(l) *Durgu Dihal Das v. Amroji* (1895) 17 All. 29, 31; *Jayendra Chandra Sen v. Wazunissa Khatun* (1907) 4 Cal. 800.
(m) *Hukum Chand v. Kamalnand* (1906) 33 Cal. 927, 931-32.
(n) *Jethabhai v. Chapsey* (1909) 34 Bom. 407.
(o) *Gunesh v. Parashottam* (1909) 34 Bom. 135.
(p) *Hukum Chand v. Kamalnand* (1906) 33 Cal. 927, 932.

(q) *Lakshmichand v. Kachubai* (1911) 13 Bom. L. R. 517, s.c. 35 Bom. 393.
(r) *Shamu Patter v. Abdul Kadir* (1912) 35 Mad. 607.
(s) *Basangowda v. Churhigirigowda* (1910) 34 Bom. 408; *Peary Choudhury v. Sonoo Dass* (1914) 19 C. W. N. 419.
(t) *Padmabali v. Ravi Lal* (1909) 37 Cal. 250.
(u) *Hindustan Assurance, Ltd. v. Ral Mulraj* (1914) 27 Mad. L. J. 645, 652.

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(ii) under *this section*, where there has been a clerical or arithmetical mistake or an error arising from an accidental slip or omission.

If a decree or order is sought to be amended or varied in any other case, it can only be done by a review of judgment under O. 47, r. 1, or by an appeal under s. 96 (v). It is doubtful whether a decree or order can be varied even by consent of parties after it is drawn up and signed (w).

Inherent power to amend decrees and orders.—Every Court has an inherent power to vary or amend its own decree or order *so as to carry out its own meaning*. In so doing it does nothing but exercise a power to correct a mistake of its ministerial officer by whom the decree or order was drawn up (x).

Illustration.

(1) A sues B and C for Rs. 5,000. The judgment awards Rs. 5,000 to A “as prayed” (i.e., as against B and C). The decree is drawn up so as to render the amount payable by B alone. The decree may be amended and brought into conformity with the judgment; *Chathuppan v. Pydal* (1892) 15 Mad. 403; *Pherozsha v. Sun Mills, Ltd.* (1898) 22 Bom. 370.

“Accidental omission.”—This section enables the Court to correct errors arising from an accidental omission. Thus where directions as to *costs* were *inadvertently* omitted, the decree was set right by adding the directions (y). Similarly, where the *date* from which the payments ordered were to run was *inadvertently* omitted, the decree was perfected by adding the date (z).

“Accidental slip.”—A *bona fide* error as to the *amount* of interest due to a party may be corrected under this section (a). And so also an error as to the *period* for which an injunction is to continue (b).

Does not apply.—Where the order as drawn up represents the real decision of the Court, the Court has no jurisdiction to rehear or alter it (c). “Even when the order has been obtained by fraud, the Court has no jurisdiction to *rehear* it. If such a jurisdiction existed, it would be most mischievous” (d).

153. The Court may at any time, and on such terms as to cost or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

Scope of the section.—O. 6, r. 17, is confined to the amendment of *pleadings*; s. 152 to correcting errors in *judgments, decrees or orders*; the present section confers a *general power* on the Court to amend *defects and errors in any proceedings in a suit* and to

(e) *Lachman v. Mohan* (1880) 2 All. 505.

(w) *Ainsworth v. Widding* [1896] 1 Ch. 673, 677.

(r) *Mellor v. Saire* (1885) 30 C. D. 239, 246.

(y) *Re Roper* (1890) 45 C. D. 120; *Chessum and Sons v. Gordon* [1901] 1 K. B. 694.

(z) *E. v. E.* [1903] P. D. 88.

(a) *Barker v. Parvis* (1886) 56 L. T. 131.

(b) *Slapworthy v. Clements* (1890) 38 W. R. (Eng.) 746.

(c) *Preston Banking Co. v. William Allou and Sons* [1895] 1 Ch. 141.

(d) *Id.* p. 143. *per Lord Halsbury*.

make *all necessary amendments* for the purpose of determining the real question at issue between the parties to the suit. In *Australian Steam Navigation Co. v. Smith and Sons* (e), their Lordships of the Privy Council said: "Their Lordships are strong advocates for amendment whenever it can be done without injustice to the other side, and even where they have been put to certain expense and delay, yet if they can be compensated for that in any way, it seems to their Lordships that an amendment ought to be allowed for the purpose of raising the real question between the parties."

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X 154. Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement.

Saving of present right of appeal.

See s. 96, sub-s. (3), and ss. 97 and 101.

X 155. The enactments mentioned in the Fourth Schedule are hereby amended to the extent specified in the fourth column thereof.

Amendment of certain Acts.

X 156. *The enactments mentioned in the Fifth Schedule are hereby repealed to the extent specified in the fourth column thereof.*

Repeals

This section and the Fifth Schedule have been repealed by the Second Repealing and Amending Act 17 of 1914, s. 3.

157. Notifications published, declarations and rules made, places appointed, agreements filed, scales prescribed, forms framed, appointments made and powers conferred under Act VIII of 1859 or under any Code of Civil Procedure or any Act amending the same or under any other enactment hereby repealed shall, so far as they are consistent with this Code, have the same force and effect as if they had been respectively published, made, appointed, filed, prescribed, framed and conferred under this Code and by the authority empowered thereby in such behalf.

Continuance of orders under repealed enactments.

158. In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any Chapter or section of Act VIII of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding Part, Order, section or rule.

Reference to Code of Civil Procedure and other repealed enactments.

THE FIRST SCHEDULE.

ORDER I.

Parties to Suits.

1. All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

Who may be joined as plaintiffs.

Joinder of plaintiffs.—This rule enables several persons to join as plaintiffs in one suit, though their causes of action may *not* be the same, *provided that*—

- (1) the right to relief, alleged to exist in them, arises out of the *same act or transaction or series of acts or transactions*; and
- (2) the case is of such a character that, if such persons brought separate suits, any *common question of law or fact* would arise.

Both these conditions should be fulfilled to enable several persons to join as plaintiffs in one suit. The two conditions are *not alternative* (f).

Illustrations.

(1) A publishes a series of books under the title of "The Oxford and Cambridge Publications" so as to induce the belief that the books are publications of the Oxford and Cambridge Universities or either of them. The Universities may join as plaintiffs in one suit to restrain A from using the title, because the publication and the belief induced are *common questions of fact* arising out of the *same series of transactions* (g).

(2) A, a shareholder in a company, sues B, C and D, the directors, to recover damages *on his own behalf* for fraudulently inducing him to purchase shares by declaring an illegal dividend; and he joins in the same suit a claim *on behalf of himself and all other shareholders* (see r. 8 below) for repayment by the defendants to the company of the amount of the dividend illegally paid out by them. A is not entitled to join both causes of action in one suit, because the right to relief claimed in his personal capacity and the right to relief claimed by him as representing the shareholders *do not arise out of the same transaction or series of transactions* (h).

(3) Four persons, each of whom separately took debentures on the faith of certain statements in a prospectus issued by the directors of a company, joined as co-plaintiffs in one suit against the directors, claiming damages for misrepresentations contained

(f) *Stroud v. Lawson* [1898] 2 Q. B. 44, 52, 54.

(g) *The Universities of Oxford and Cambridge v.*

George Gill and Sons [1899] 1 Ch. 55.

(h) *Stroud v. Lawson*, [1898] 2 Q. B. 44.

in the prospectus. *Held* that as the several causes of action arose out of the same transaction, and the case would involve common questions of fact, the suit was properly framed (i). O. 1,
rr. 1-3.

Jointly, severally, or in the alternative.—Where a right to relief in respect of the same act or transaction is alleged to exist in two or more persons *severally*, they may join as plaintiffs in one suit, or they may at their option bring separate suits. The rule does not require that they should join as plaintiffs in one suit. A Hindu priest raises a masonry structure upon a certain platform round a sacred tree, on which *every* member of the community has an *individual* right to perform religious rites. Here every member of the community has *individually* a cause of action, and any one member may therefore sue the priest for the removal of the structure. But it is not necessary that all the members should join as plaintiffs in one suit. They *may* so join if they choose, but the law does not say that they *should* all so join (j). The same rule applies when two or more persons are entitled to the same relief *in the alternative*. The rule, however, is different when two or more persons are *jointly* entitled to the same relief in respect of a transaction. In that case all persons so entitled must join as plaintiffs in one suit. Thus if A, B and C are *joint-owners* of a property, they must all be joined as plaintiffs in a suit to recover the property (k). So in a suit to recover ancestral property, all the members of the joint family should sue together (l). If any one of them does not consent to join as plaintiff, he may be joined as defendant [r. 10, sub-r. (2)]. The proper course is first to ask him to join as plaintiff, and if he refuses to join him as defendant.

2. Where it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may put the plaintiffs to their election or order separate trials or make such other order as may be expedient.

This rule contemplates the case where a suit has been brought by several plaintiffs in respect of the same act or transaction, but where the causes of action are so distinct that it may not be convenient to dispose of them at one trial. In such a case the Court may put the plaintiffs to their election as to which of them should proceed or order separate trials or make such other order as may be expedient. A suit by several creditors, joining as co-plaintiffs in a creditor's action, or a suit by several market gardeners claiming certain preferential rights as to stands in the market, is not a suit where the joinder could embarrass or delay the trial (m). As to "cause of action", see notes to S. 20 above.

3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise.

(i) *Dringbier v. Wood* [1899] 1 Ch. 393; and see *Franklin v. Great Horseless Carriage Co.* [1901] 1 Q. B. 504.

(j) *Bajjial v. Lalal* (1897) 24 Cal. 385.

(k) *Kathusheri v. Vallotil* (1881) 3 Mad. 234.

(l) *Collector of Monghyr v. Hurdat Narain* (1880) 5 Cal. 425.

(m) *Bedford v. Ellis* [1901] A. C. 1, 12.

- O. 1. r. 3. Joinder of defendants.**—Under this rule all persons may be joined as defendants against whom *any* right to relief in respect of the *same act or transaction* is alleged to exist, where, if separate suits were brought against such persons, any *common question of law or fact* would arise.

Illustrations.

1. *A*, riding in an omnibus belonging to *B*, is injured by a collision between the omnibus and a cart belonging to *C*. *A* sues *B* and *C* for damages for personal injury charging the defendants *jointly* with joint negligence, and, alternatively charging *separate* negligence against each defendant. The suit is not bad for misjoinder of defendants, because the injury to the plaintiff arose from the *same transaction or series of transactions* and the case involves *common questions of fact* (n).

2. *M* mortgages certain property to *X*. After *X*'s death, *A* claiming to be the adopted son of *X* sues *M* on the mortgage, and a consent decree is passed in the suit. Subsequently *B*, alleging that she is the sister and heir of *X*, sues *A* and *M* (1) for a declaration that the adoption of *A* was not validly made, and (2) that the consent-decree (to which she was not a party) is not binding on her. The suit is bad for misjoinder, for the relief sought is in respect of *two distinct acts or transactions, namely*, (1) adoption and (2) consent-decree, and there is *no common question of fact or law* which affects both the defendants (o).

3. *A* is an exporter of frozen meat. *B* is the owner of a line of steamers. By a contract between *A* and *B*, *B* agrees to carry from Argentina to Europe frozen meat in steamers belonging to him or in other suitable steamers. It is subsequently agreed between *A* and *B* that frozen meat should be shipped by *A* on a steamer called the *Devon* procured by *B*, but belonging to *C*. Meat is accordingly shipped on the *Devon* and the master of the *Devon* signs a bill of lading in respect of it and hands it to *A*. *A* sues *B* and *C* in respect of damage to the meat alleged to have been caused by the unseaworthiness of the *Devon*, claiming against *B* on the terms of the beforementioned contract and against *C* upon the bill of lading. The suit is not bad for misjoinder of defendants (p).

"Jointly."—*A* obtains a lease of certain lands from *B* (landlord), and enters into possession of the lands. *B* then lets the land in separate portions to *C*, *D* and *E*. Subsequently *B*, *C*, *D* and *E* forcibly dispossess *A* of the land. *A* may sue *B*, *C*, *D* and *E* in one suit for ejectment. The plaintiff being entitled to claim possession of the land *as a whole*, the mere fact that *C*, *D* and *E* hold *specific and distinct* portions of the land under *different* demises from *B*, does not make the suit bad for misjoinder of defendants *Nundo v. Banomali* (1912) 29 Cal. 871; *Raghunath v. Sarosh* (1899) 23 Bom. 266.

"Severally."—Certain property held by *A* is sold under the Madras Rent Recovery Act in separate lots for arrears of rent, and purchased by *B*, *C* and *D* respectively. *A* sues *B*, *C* and *D* to set aside the sale on the ground that proper notice of sale was not given. The suit is not bad for misjoinder of defendants merely because the property was sold to *different purchasers*. "The proceeding under which the various items [of the property] were sold was *one*, and the *ground* upon which the validity of the sale was impugned is the *same* in each case" (q). To use the words of the present rule, the

(n) *Bullock v. London General Omnibus Co.* [1907] 3 K. B. 264; *Frankenburg v. Great Horseless Carriage Co.* [1900] 1 Q. B. 504.
(o) *Umabai v. Bhairu Bai* (1938) 34 Bom. 358.

(p) *Compania Sansinena v. Houlder Brothers & Co.*, [1910] 2 K. B. 354.
(q) *Doraisami v. Aluthusamy* (1901) 27 Mad. 94.

right to relief claimed is in respect of the same act or series of acts, and there is a common question of fact and law.

O. 1,
rr. 3-6.

"In the alternative."—*A* executes a lease of his land to *B* for a period of two years. At the end of the first year *A* sells the land to *C*. *C* demands rent for the second year from *B*. *B* alleges payment of the whole rent for two years to *A* in advance. *C* may sue *A* and *B* praying for a decree against *A*, if it be found that *B* paid the rent to *A* as alleged, or, in the alternative, against *B*, if it be found that *B* did not pay the rent to *A*: *Madun Mohun v. Holloway* (1886) 12 Cal. 555; *Mowji v. Kuvjerji* (1907) 31 Bom. 516.

Court may give judgment for or against one or more of joint parties.

4. Judgment may be given without any amendment,

(a) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to :

(b) against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

Cls. (a) and (b). Cl. (a) of this rule is to be read with rule 1 above and cl. (b) with rule 3 above.

5. It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him.

Defendant need not be interested in all the relief claimed.

Scope of the rule.—This rule is to be read with rule 3 above. It provides in effect that where a suit is brought against several defendants, the mere fact that every defendant is not interested as to all the reliefs claimed in the suit is no ground for objection that the suit is bad for misjoinder of defendants.

6. The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes.

Joinder of parties liable on same contract.

Several liability on a contract.—This rule is confined to suits on contracts. The liability on a contract may be either (1) several, or (2) joint and several, or (3) joint. *A* and *B*, each for himself, agrees to pay Rs. 5,000 to *C*. Here *A* and *B* are severally liable on the contract. *C* may therefore bring one suit against *A* and *B*, or he may bring a separate suit against *A* and a separate suit against *B*.

Joint and several liability on a contract.—The legal consequences of a joint and several liability on a contract are the same as those of several liability. Thus if *A* and *B*, pass a bond to *C* for Rs. 5,000, and the bond provides that *A* and *B* should jointly and severally pay the amount to *C*, *C* may sue *A* and *B* jointly, or he may sue them separately as in the case where the liability is several.

O. 1,
r. 6, 7.

Joint liability on a contract.—The present rule does not provide for the case of a *joint* liability arising on a contract or negotiable instrument. The reason is that so far as liability on a contract is concerned, s. 43 of the Indian Contract Act, 1872, makes all joint contracts joint and several. It allows a promisee to sue one or more of several joint promisors as he chooses, and excludes the right of a joint promisor to be sued along with his co-promisors (*r*). A partnership firm consisting of two persons, *A* and *B*, purchases from *C* goods worth Rs. 5,000. The liability of partners is *joint*, and *A* and *B* are therefore *jointly* liable to pay the price to *C*. But under s. 43 of the Contract Act *C* may sue either *A* or *B* at his option. It is not incumbent upon *C* to make both *A* and *B* defendants. If *C* sues *A* alone, and a decree is passed against *A*, he cannot, according to English law, afterwards sue *B*, though the decree against *A* may remain unsatisfied. The reason is that there is in the case of a joint contract a single cause of action which can only be once sued on. The same view has been taken by the High Courts of Calcutta, Madras, and Bombay. On the other hand, it has been held by the High Court of Allahabad, that the effect of s. 43 of the Indian Contract Act, 1872, is to make all *joint* contracts *joint and several*. Therefore, where *C* obtained a judgment against *A* upon a joint bond executed by *A* and *B*, and the judgment remaining unsatisfied, he sued *B* for the same money, it was held by that Court that the suit against *B* was not barred (*s*).

"Parties to bills of exchange."—*A* draws a bill of exchange upon *B* payable to *C* or order. The bill is accepted by *B*, *C* then endorses the bill to *D*, *D* endorses it to *E*, and *E* to *F*. If the bill, while in the hands of *F*, is dishonoured, *F* may at his option sue *A* (the drawer), or *B* (the acceptor), or *C* (the endorser) or *D* (the endorser), or *E* (the endorser), or *F* may bring one action against all or any of them (*t*).

7. Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.

When plaintiff in doubt from whom redress is to be sought.

Scope of the rule.—This rule applies only where the plaintiff is *in doubt* as to the person from whom he is entitled to obtain redress. It does not enable a plaintiff to join *separate causes of action* against *different defendants* in one action in a case where he could not do so under r. 3 above (*u*). Thus if damage is caused to *A*'s house, and he is in doubt as to whether it was caused by *excavation works* carried on by a County Council or by a Water Company *allowing water from its mains to weaken the soil* in front of the house, *A* cannot join the Council and the Company in one action, for these are *two distinct torts*. It does not matter that the resulting damage is the same in each case; for it is not the *damage* that constitutes the cause of action, but the *injuria* or the wrong done by a tort-feasor (*v*). The present rule does not apply to such a case. The following, however, is a case to which the present rule applies. *M*, purporting to act as agent

(*r*) *Hemendro v. Rajendralall* (1878) 3 Cal. 353, 360; *Lukmidas v. Puroshotamdas* (1882) 6 Bom. 700, 701; *Gursami v. Samurti* (1881) 5 Mad. 37; *Narayana v. Lakshmana* (1897) 21 Mad. 256; *Muhammad v. Radhe Ram* (1900) 22 All. 307, 315.
(*s*) See the cases cited above.

(*t*) *Pestonji v. Mirza* (1878) 3 Cal. 541.
(*u*) *Thompson v. London County Council* (1899) 1 Q. B. 840, 844.
(*v*) *Frankenburg v. Great Horseless Carriage Co.* [1900] 1 Q. B. 504, 510, explaining *Thompson v. London County Council* [1899] 1 Q. B. 840.

for *C*, enters into a contract with *A*. *M* fails to perform the contract. Here if *A* is certain that *M* was *C*'s agent, *A* can sue *C* alone, *C* being the principal. Again, if *A* is certain that *M* falsely represented himself to be *C*'s agent, *A* can sue *M* alone. But if *A* is in doubt as to whether *M* had authority from *C* to enter into the contract, *A* may sue both *M* and *C* (*iv*). See Contract Act, ss. 230 and 235.

O. 1,
rr. 7, 8.

8. (1) Where there are numerous persons having the same interest in one suit, one or more of such persons may with the permission of the Court sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party to such suit.

Object of the rule.—This rule is an exception to the general rule that *all* persons interested in a suit ought to be made parties thereto (*x*). Convenience requires that in suits where there is a community of interest amongst a large number of persons, a few should be allowed to represent the whole so that trouble and expense may be saved (*y*).

Application of the rule.—The provisions of this rule apply only if (1) the parties are *numerous*, and (2) have the *same interest*, and (3) the necessary *permission* is obtained and (4) *notice* given.

"Numerous parties."—Where the number of defendants was thirty, it was held to be numerous (*z*). It has been held, by the High Court of Madras that a suit cannot be brought under this rule on behalf of the *general public* (*a*), or on behalf of the *Hindu community*, as neither "the general public" nor the Hindu Community is *capable of ascertainment* (*b*). But a different view has recently been taken by the High Court of Calcutta, the latter Court observing that it was not necessary to the application of this rule that the parties should be capable of being ascertained (*c*).

"Same interest."—It is essential that the parties should have the *same interest* in the suit. Thus, where there are *numerous legatees* under a will, any one legatee may sue the executors on behalf of himself and the other legatees for a discovery of the estate of the deceased come into their hands, as they have all the same interest in having the

w) *Bennetts & Co. v. Mellorath & Co.* [1896] 2 Q. B. 404.

x) *Chudasama v. Partapsang* (1904) 28 Bom. 214.

y) *Srinivasa v. Raghava* (1900) 23 Mad. 28.

z) *Andrews v. Salmon* (1888) W. N. 102.

a) *Adamson v. Arumugam* (1898) 9 Mad. 468.

b) *Sajedur Raja v. Baidyanath* (1893) 20 Cal. 397.

c) *Monnotho Nath v. Harish Chandra* (1906) 33 Cal. 905, 910-912.

O. 1. r. 8. will proved (d). Similarly where a person dies leaving *numerous creditors*, any one creditor may sue on behalf of himself and the other creditors, as they all have the same interest in making out the estate of the deceased as large as possible (c). It is absolutely necessary for the application of this rule that the parties should have the same *interest*. It is not sufficient that their interest arises from the same *transaction*. Therefore, where goods of several persons are shipped under *separate bills* of lading, the mere fact that the goods of all the persons are lost by the same cause does not entitle any one or more of them to bring a representative suit on behalf of themselves and others against the owner of the ship (f).

In the case of a club consisting of numerous members, the suit may be brought by the secretary on his own behalf *and on behalf of the other members* under this rule (g), or it may be brought by any one member on his own behalf *and on behalf of the other members* (h).

Suit by a member of a community in his own right.—This rule is an enabling rule. It does not debar a member of a community from maintaining a suit in his own right, though the act complained of is injurious to the whole community. Thus if Mahomedans belonging to a particular sect are not allowed to use a mosque for prayer, any member of the sect entitled to use the mosque may sue as plaintiff to enforce the right. It is not necessary that the suit should be brought by him on behalf of himself and *all other members* of the sect entitled to use the mosque. Similarly, any member of a community may bring a suit to set aside unauthorized alienations of endowed property or of property belonging to the community or for the removal of encroachments upon such property (i).

At what stage of the suit should permission be obtained?—The proper course is to obtain the permission *before* the suit is instituted; but there is nothing in the rule to show that if it is not so done, it cannot be granted afterwards. Hence the permission may be granted even *after* the institution of the suit (j).

"May be sued."—This rule applies not only to the case of numerous plaintiffs having the same interest, but also to the case of numerous defendants having the same interest. Thus where the inhabitants of a village assert a right of way over land belonging to the plaintiff, the plaintiff may, with the permission of the Court, sue any one, or more of the inhabitants on behalf of them all (k). The consent of the defendants on the record is not necessary for this purpose (l).

"May defend."—When there are numerous defendants having the same interest, any one of them "may be sued" on his behalf and on behalf of others. But where this is not done, and *all* the defendants are on the record, any one defendant "may defend" the suit on behalf of himself and the rest with the permission of the Court.

Title of the suit.—The title of the suit in such cases, where the plaintiffs are numerous, is *A. B. on behalf of himself and all other the creditors of X. Y. v. C. D.*; and

(d) *Geerebulla v. Chunder Kunt* (1885) 11 Cal. 213.

(e) *The Oriental Bank Corporation v. Gobind* (1853) 9 Cal. 104; *Lrahimkhat v. Kullai* (1902) 26 Bom. 577.

(f) *Markt & Co. v. Knight Steamship Co.* [1910] 2 K. B. 1021.

(g) *Muhammadan Association v. Bukshji* (1884) 6 All. 284.

(h) *Mahomed v. Husen* (1898) 22 Bom. 729.

(i) *Gulla v. Basanta* (1910) 32 All. 284; *Ramchandra v. Ali* (1911); 5 All. 197.

(j) *Fernandez v. Rodriguez* (1897) 21 Bom. 184; *Chennu v. Krishnan* (1902) 25 Mad. 369; *Baldeo v. Bir Gir* (1900) 22 All. 209; *Ahmed Ali v. Abdul Majid* (1917) 44 Cal. 258.

(k) *Chuni Lal v. Ramkishan* (1888) 15 Cal. 460.

(l) *Ambalam v. Bartle* (1911) 36 Mad. 418, 425.

where the defendants are numerous, it is *A. B. v. C. D.* on behalf of himself and all other inhabitants of village X.

O. 1,
rr. 8-10.

9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Misjoinder or non-joinder of parties.—A misjoinder or non-joinder of parties is not fatal to the suit. Where there is a *misjoinder* of parties, the name of the plaintiff or the defendant who has been improperly joined, may be struck out under r. 10, sub-r. (2) below, and where there is a non-joinder of persons who are necessary parties to the suit, they may be added as parties under the same rule.

10. (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a *boni fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) The Court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added, as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where a defendant is added the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of

Where defendant added,
plaint to be amended. 2
fies.
A. 1 2

O. I, r. 10. the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

(5) Subject to the provisions of the Indian Limitation Act, 1877, section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

SUB-RULE (1).

Scope of sub-rule (1).—Sub-rule (1) contemplates cases in which a suit is brought by a plaintiff, and he subsequently finds out that he cannot get the full relief he seeks without joining some other person as co-plaintiff (*m*), or where it is found that some other person, and not the original plaintiff, is entitled to the relief claimed. In the former case, the application (which must be made by the original plaintiff) will be for *adding*, and in the latter, for *substituting* that other person as *plaintiff*. But the Court must be satisfied before the application is granted that the amendment has become necessary through a *bonâ fide* mistake on the part of the original plaintiff. The following are the leading cases:—

(1) The Official Assignee of Madras constitutes *A. B.*, Official Assignee of Bombay, his attorney to institute a suit on his behalf in Bombay. *A. B.*, instead of suing as “constituted attorney of the Official Assignee of Madras,” sues by mistake as “Official Assignee of Bombay.” The plaint may be amended under sub-rule (1) by substituting the former description for the latter: *Sardarmal v. Aranvayal* (1897) 21 Bom. 203.

(2) *A* sues *B* for work done under a contract. *B* contends that the contract has been assigned by *A* to *C*, and *A* therefore has *no right to sue*. *A* says that the assignment is not an absolute one, but by way of charge only, and that he has therefore a right to sue. It is found that the assignment to *C* is an absolute one and that there was a *bonâ fide* mistake on the part of *A* in believing that the assignment was by way of charge only. The plaint may be amended by substituting *C* as plaintiff: *Hughes v. Pump House Hotel Co.* [1902] 2 K. B. 485.

SUB-RULES (2) to (5).

Parties when added.—A person may be added as a party to a suit in the following two cases only:—

- (1) when he *ought* to have been joined as plaintiff or defendant, and is not so joined; or
- (2) when, without his presence, the questions in the suit cannot be completely decided.

There is no jurisdiction to add a party in any other case (*n*). Thus a person should not be added as a defendant merely because he would be *incidentally* affected by a judgment (*o*).

Parties cannot be added so as to alter the nature of the suit.—*A* sued for his *share* of the estate of a deceased relative. On an application to have other persons

(*m*) *Ayscough v. Bullar* (1889) 41 C. D. 341.

(*n*) *McCheane v. Gyles* (No. 2) [1902] 1 Ch. 911, 918.

(*o*) *Moser v. Marsden* [1802] 1 Ch. 497.

interested in the said estate added as parties to the suit, it was held that the Court could not add them as parties, as to do so would be to alter the nature of the suit by converting it into a *general administration suit* (p) O. 1,
rr. 10-13

"Any defendant be made a plaintiff."—A brought a suit for dissolution of partnership and for partnership accounts against his co-partners. He then settled with most of the defendants, and applied to the Court for leave to withdraw the suit or that the suit might be dismissed. Two of the defendants objected to the dismissal of the suit, and applied that they might be made plaintiffs, and that the plaintiff might be made a defendant and the suit proceeded with. The Court granted the application (q).

Consent of person added as plaintiff.—If any person who ought to have been joined as plaintiff does not consent to join as plaintiff, he may be made a defendant in the suit. The proper course is first to require him to join as plaintiff, and if he refuses to join as plaintiff, then to join him as defendant. But the suit will not be dismissed merely because he is joined as defendant without being first called upon to join as plaintiff.

Limitation Act, sec. 22, provides amongst other things that when, after the institution of a suit, a party is added as a plaintiff or defendant, the date of addition is to be considered as regards that party as the date of the institution of the suit. Thus where A, B and C were three partners, and A sued B only for a partnership account, and C was added as a defendant after the period of limitation, the suit was dismissed (r).

11. The Court may give the conduct of the suit to such person as it deems proper.

12. (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding; and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in Court.

13. All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

(p) *Oh Ling Tee v. Awlamsee* (1898) 10 W. R. 80
Hungu Lal v. Baldeo Ram (1902) 24 All. 553
 (q) *Eduyee v. Vellubhoy* (1883) 7 Bom. 187
 (r) *Ramdayal v. Jonmenjoy* (1887) 14 C. 11 791

- O. 1. r. 13. "Unless the ground of objection has subsequently arisen."—Thus if a co-parcener or a reversioner or a remainderman is born *after* the settlement of issues in a suit to which he is a necessary party, he should be joined as a party. If he is not joined as a party, the defendant may object to his non-joinder, though it be *after* the settlement of issues.

ORDER II.

Frame of Suit.

O. 2.
rr. 1, 2.

1. Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

Rules 1 and 2.—From this rule read with rule (2) below, the intention of the legislature appears to be that as far as possible all matters in dispute between the parties relating to the same transaction should be disposed of in the same suit (s).

2. (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

Suit to include the whole claim.

- (2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Relinquishment of part of claim.

- (3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Omission to sue for one or several reliefs.

Explanation.—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

Illustration.

O. 2, r. 2.

A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.

Splitting of claim.—The object of the rule is, to use the language of r. 1, “to prevent further litigation.” For that purpose the rule provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action. He shall not be entitled to split his cause of action into parts, and bring separate suits in respect thereof. If he omits to sue in respect of, or intentionally relinquishes, any portion of the entire claim arising from the same cause of action he will be precluded from suing in respect of the portion so omitted or relinquished, though he may allege in his plaint that he intends bringing a second suit for the portion omitted (i). But a plaintiff will not be said to have omitted to sue in respect of a portion of his claim within the meaning of this rule, unless he was, at some time prior to the suit, aware or informed of the claim or of the facts which would give him a cause of action (u). If the plaintiff was aware of the claim, and omitted to sue in respect thereof, he could not afterwards sue in respect thereof, though the omission was accidental or involuntary (v). The following are some of the leading cases :—

(1) A owes B Rs. 2,200. B may relinquish Rs. 200 to bring his suit within the jurisdiction of a Presidency Small Cause Court, and may sue A in that Court for Rs. 2,000. Here the relinquishment being intentional, B cannot afterwards sue A for Rs. 200, the portion relinquished. But if the suit is transferred on A's application to the High Court, B may add Rs. 200 to his claim, the High Court having jurisdiction over the entire claim : *Ramall v. Bhajhari* (1895) 1 C. W. N. 32.

(2) A Mahomedan wife sues her husband to recover property belonging to her including Government paper of the value of Rs. 100,000, and a decree is passed in her favour. She afterwards sues the husband to recover from him Government paper of the value of Rs. 5,000, alleging that she omitted to include the same in the previous suit by an oversight. The suit is barred, for she was aware of her claim when she brought the previous suit : *Buckoor Ruheem v. Shumsoonnissa* (1867) 11 M. I. A. 551.

(3) Where a promissory note is payable by instalments, and two or more instalments have become due, and the holder of the note sues only for one of the instalments, and omits to sue for the other instalments, he cannot afterwards sue for those instalments : *Muckintosh v. Gill* (1871) 12 B. L. R. 37.

Distinct causes of action.—If the cause of action in the subsequent suit is different from that in the first suit, the subsequent suit is not barred. What the rule requires is that every suit shall include the whole of the claim arising from one and the same cause of action, and not that every suit shall include every claim or every cause of action which the plaintiff may have against the defendant (w).

Illustrations.

(1) A, claiming as his father's heir, sues B for possession of certain lands. He then sues C, also as his father's heir, for possession of another plot of land. The second suit

(i) *Maksud v. Nargis* (1893) 20 Cal. 322.

(u) *Amanat v. Imdad Husain* (1889) 15 Cal. 800, 16 I. A. 106; *Sankaran v. Paranthi* (1899) 19 Mad. 145; *Batul Kumar v. Munni Lal* (1910) 32 All. 623.

(v) *Buckoor Ruheem v. Shumsoonnissa* (1867) 11

M. I. A. 551, 604-605.

(w) *Pillapur Raja v. Surina Rau* (1884) 8 Mad. 520, 524, 12 I. A. 116, 119; *Amanat v. Imdad Husain* (1889) 15 Cal. 800, 15 I. A. 106; *Hanuman v. Hanuman* (1892) 19 Cal. 123, 18 I. A. 158.

O. 2, r. 2. is not barred, for the causes of action in the two suits are entirely distinct, and moreover the suits are against different individuals: *Dampnaboyina v. Addalla* (1902) 25 Mad. 736; *Narayan v. Shamrao* (1903) 27 Bom. 379.

(2) A suit by a Mahomedan widow for *dower* is no bar to a subsequent suit by her for a declaration of her right to possess for life her husband's estate in accordance with a proved local custom: *Mahomed v. Hasin Banu* (1894) 21 Cal. 157, 20 I. A. 155.

(3) A suit to *eject* a tenant holding under a lease is no bar to a subsequent suit against him for *rent* under the same lease: *Subraya v. Rathavelu* (1909) 32 Mad. 330.

Successive claims arising under the same obligation constitute a single cause of action.—This is explained by the illustration to the section which shows that if rent has become due for the years 1905, 1906 and 1907, the landlord can bring only one suit for the *whole* of the rent in arrears, and that if he sues for the rent due for a particular year only, he will be precluded from suing for the rent due for the other years.

Interest due on a mortgage or on a promissory note, maintenance, *malikana*, &c., are other instances of "successive claims arising under the same obligation."

Different causes of action arising from the same transaction.—This rule does not require that when several causes of action arise from one transaction, the plaintiff should sue for all of them in one suit. What the rule lays down is that where there is *one entire cause of action*, the plaintiff cannot split the cause of action into parts so as to bring separate suits in respect of those parts. As observed by their Lordships of the Privy Council in *Payana v. Para Lana* (x), the rule "is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transactions."

Omission to sue for one of several reliefs.—Where a person is entitled to more than one relief in respect of the same cause of action, he may sue for all the reliefs, or he may sue for one or more of them and reserve his right with the leave of the Court to sue for the rest (y). If no such leave is obtained, he will be precluded from afterwards suing for any relief so omitted (z). The leave of the Court must be obtained at the time of the institution of the suit.

Illustration.

On 1st March, 1905, A enters into an agreement with B for the sale of his lands to B, the sale to be completed on 1st August, 1905. It is agreed that B should pay part of the purchase-money on the date of the agreement, and that A should, on such payment being made, put B in possession of the land. B pays part of the purchase-money, and A puts him in possession. The sale is not completed on 1st August owing to certain differences between the parties. On 15th August, A forcibly removes B from the land, and enters into possession. Thereupon B sues A for possession, but omits to sue for specific performance of the agreement for sale. B cannot afterwards sue A for specific performance. *Rangayya v. Nanjappa* (1901) 24 Mad. 491, 28 I. A. 221, with facts slightly varied.

Summary of the above :—

- (a) one and the same transaction may give rise to several distinct causes of action, and a plaintiff may bring as many suits as there are causes of action.

(x) (1913) 41 I. A. 142, 148.

(y) *Pestonji v. Abdul* (1881) 5 Bom. 463.

(z) *Abdul Hakim v. Karam Singh* (1915) 37 All. 646.

(b) One and the same *cause of action* may give rise to several *reliefs*, but a plaintiff may not bring *separate* suits in respect of the several reliefs *except* with the leave of the Court. O. 2,
rr. 2, 3.

(c) Not more than one suit can be brought in respect of a *single cause of action*, in other words, a plaintiff cannot split a cause of action.

✓ **3. (1)** Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

Joinder of causes of action.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

Scope of the rule.—O. 1, r. 1, deals with joinder of plaintiffs; O. 1, r. 3, deals with joinder of defendants, the present rule deals with joinder of causes of action. It is to be applied subject to the provisions of rr. 4 and 5 below, as is shown by the words “save as otherwise provided”. It is also to be read with rr. 6 and 7 below.

One plaintiff, one defendant and two or more causes of action.—Where there is only one plaintiff, and only one defendant, the rule says that the “plaintiff may unite in the same suit several causes of action against the same defendant,” provided, of course, that the provisions of rule 5 of this Order are not contravened. If the causes of action are so disconnected that they cannot be conveniently tried together, the Court may order separate trials under r. 6 below. These trials, however, will not be distinct suits, but they will be in the nature of sub-suits under the title and number of the principal suit from which they spring (a).

Misjoinder of plaintiffs and causes of action.—Where there are *two or more plaintiffs* and *two or more causes of action*, the rule says that “any plaintiff having causes of action in which they are *jointly interested* against the same defendant . . . may unite such causes of action in the same suit.” Where the plaintiffs are *not jointly interested* in the causes of action, the suit is said to be bad for *misjoinder of plaintiffs and causes of action*. X sells to Y two plots of land adjoining each other, one of which is claimed by A by adverse possession, and the other by B also by adverse possession. A and B could not join together as plaintiffs in one suit against X and Y, for the evidence of adverse possession by A would not be evidence of adverse possession in favour of B and *vice versa* (b).

Where a plaint is defective by reason of misjoinder of plaintiffs and causes of action, the Court may grant leave to the plaintiffs to amend the plaint within a time fixed by the Court, and may order that if the amendment is not made within the time prescribed,

(a) *Rhadarsaheb v. Chotibibi* (1884) 8 Bom. 616.

(b) *Aiyaru v. Vellaya* (1910) 31 Mad. 55.

- Q. 2, r. 3. the suit shall stand dismissed with costs. Where leave is granted to amend, the plaintiffs have to elect as to which of them should proceed on the plaint already filed, and the plaint should then be amended by striking out the names of the other plaintiffs and by making consequential amendments (c) (see O. 6. rr. 17, 18).

Misjoinder of defendants and causes of action (Multifariousness).—Where there are *two or more defendants* and *two or more causes of action*, the rule says that the plaintiff may unite in the same suit several causes of action against the same defendants *jointly*. “Joint interest in the main questions raised by the litigation is a condition precedent to the joinder of several causes of action against several defendants.” If the causes of action alleged are *separate* and the defendants are arrayed in *different sets*, the suit is bad for misjoinder of defendants and causes of action, technically called *multifariousness*. “There is no provision in the Code allowing *distinct* causes of action against *distinct* sets of defendants, that is to say, causes of action in which the defendants are *not all jointly interested*, to be united in one suit” (d).

Illustrations.

(1) Seven different salt manufacturers enter into seven different contracts with A, to manufacture salt for A and deliver it in his factory. A, alleging that all the seven persons had failed to deliver salt according to the terms of the agreement with them, brings one suit against them for a decree that they might be directed to deliver the salt to him. The suit is bad for multifariousness, for the breach of each contract gives rise to a distinct cause of action, and no one defendant is interested in any of the causes of action arising from the breach of contract with the other defendants: *Namasioya v. Kadir Ammal* (1894) 17 Mad. 168.

(2) A, B and C are members of a joint Hindu family. The family owns two properties X and Y. A sells his undivided interest in property X to D. Subsequently A, B and C effect a partition of the properties whereby the whole of property X goes to B and C. D then sues A, B and C for (1) specific performance and (2) partition. One of the reasons given in the plaint for joining B and C as parties to the suit is that B and C knew of the agreement for sale, and that the object of the parties in allotting property X was to defraud D of his rights under the contract. Here B and C are necessary parties to the suit so far as it relates to specific performance, they being on the plaintiff's allegation subsequent transferees with notice. But the claim for partition is wrongly joined with the claim for specific performance, as at the date of suit D had no right to sue for partition, he not having completed his title by a sale deed: *Rangayya v. Subramania* (1917) 40 Mad. 365 [F. B.].

Where a plaint is defective by reason of misjoinder of defendants and causes of action, as where A sues B and C in respect of *distinct* causes of action, the Court may allow A to withdraw from the suit against B with liberty to bring a fresh suit against B, and to proceed with the suit against C (e), or allow A to amend the plaint by striking out B's name and proceed with the suit against C.

In a suit for ejectment all persons alleged to be in wrongful possession of the land may be joined as defendants though they may claim under different titles.—A obtains a lease of a piece of land from B, and enters into possession of the land. B then lets the land in separate portions and by *separate leases*

(c) *Aldridge v. Barrow* (1907) 34 Cal. 602 [no longer an authority on the point of misjoinder].

(d) *Mullick Kefait Hossain v. Sheo Pershad Singh*

(1896) 23 Cal. 821, 826; *Umabai v. Bhai Balwant* (1908) 34 Bom. 358.

(e) *Luckunson v. Fazulla* (1881) 5 Bom. 177, 179

to C, D and L. A sues B, C, D and L to eject them from the land. The suit is not bad for multiplicity. In this, as in every action of ejectment, there is but one cause of action, namely, dispossession. It is immaterial that C, D and L claim under *different titles*. The title by which they claim forms no part of the plaintiff's cause of action (f).

O. 2,
rr. 3, 4.

Where two or more persons conspire together to commit a wrong, or to commit a breach of several contracts entered into with them separately by the plaintiff, they may all be joined as defendants in one suit.—The reason is that the plaintiff has in each case but one cause of action against all the defendant, namely, a combination to do the act complained of. Thus where A obtains a decree against L for possession of certain lands in which 86 persons had distinct and separate tenures and the 86 persons *bind together* to keep L out of possession and declined to pay the rent, it was held that A must join the 86 tenants as defendants in one suit for a declaration of his proprietary right to the lands (g). But separate suit should be brought if there is no collusion or combination between the tenants (h).

Two or more plaintiffs, two or more defendants, and two or more causes of action.—In such a case the plaintiff must be jointly interested in the causes of action, and the defendants also must be jointly interested in the causes of action. The rule says: Any plaintiffs having causes of action in which they are jointly interested against the same defendants, may unite such causes of action, in the same suit.

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movable property

4. No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, except—

- (a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof,
- (b) claims for damages for breach of any contract under which the property or any part thereof is held; and
- (c) claims in which the relief sought is based on the same cause of action.

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property.

Joinder of claims.—This rule deals with what may be called *joinder of claims*. It declares that no claims other than those specified in the three exceptions shall be joined without the leave of the Court with a suit for the recovery of immoveable pro-

(f) *Nundo Karmar v. Banomali* (1902) 29 C 1 8-7
880 *Ila v. Clunder v. Rameswar* (1811)
24 C 1 8 1 *Arbath v. Mithal* (1710))
All 267 *Umbar v. Vittal* (1909) 30 Com

203
(g) *Lake Nath v. Keshab Ram* (1886) 13 Cal 147
(h) *Ram Naram v. Innoia* (1887) 14 Cal 681
Sudheer v. Durja (1887) 14 Cal 430

O. 2, rr. 4, 5. party." The object of the rule is to prevent a joinder with a claim for the recovery of *immovable property of claims of other and dissimilar character.*

This rule does not apply to a joinder of several claims, all for the recovery of immovable property. A plaintiff may therefore bring one suit for possession of several immovable properties without the leave of the Court. Thus if A owns 20 parcels of land, and he is dispossessed of all these parcels by B, A may, *without the leave* of the Court, bring one suit against B for the recovery of all the plots. Here there is a joinder of 20 claims, but they are all claims for the *recovery* of immovable property (*i*).

Suit for the recovery of immovable property.—An action to *establish title* to immovable property not claiming *possession*, is not an action for the recovery of immovable property within the meaning of this rule, so as to require the leave of the Court for its joinder with another cause of action (*j*).

Joinder of claims for recovery both of moveable and immovable property.—This rule is to be read with r. 2 above, which directs that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action. Hence there is nothing irregular in seeking to recover immovable and moveable property in one suit *without* the leave of the Court, *if the cause of action is the same in respect of both*. Nay, if the plaintiff in such a case sues to recover only one of the two kinds of property, he will be precluded from suing for the other by virtue of the provisions of r. 2 above. Thus where a Mahomedan died leaving two heirs, A and B, and C purchased from A certain *immovable property* that had come to A's share, and from B certain *moveable property* that had come to B's share, and both the properties were at the time of purchase in the wrongful possession of D, it was held that not only could C sue D for the recovery of both the moveable and immovable property in one suit, without the leave of the Court, but that if he did not do so, he would be precluded from afterwards suing for the property omitted in the first suit (*k*).

Proviso to the rule.—The proviso to the rule enables a plaintiff to claim in one suit redemption or foreclosure *and* possession.

Leave of Court.—The proper course is to obtain leave *before* the plaint is filed. But since the leave under this rule is not a *condition precedent* to jurisdiction, it may be granted on good cause shown even *after* the institution of the suit (*l*).

5. No claim by or against an executor, administrator, or heir, as such, shall be joined with claims by or against him personally, unless the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or as such as he was entitled to, or liable for, jointly with the deceased person whom he represents.

Scope of the rule.—This rule provides that no claim by a person in his *representative character* shall be joined in the same suit with claims by him *personally* nor shall

(i) *Chidambaram v. Ramasami* (1882) 5 Mad. 161.

(j) *Glodhill v. Hunter* (1880) 14 C. D. 492.

(k) *Ganesh v. Jeevath* (1904) 31 Cal. 262, 31 T.A. 10.

(l) See *Lloyd v. Great Western and Metropolitan Dairies Co., Ltd.* (1907) 23 Time, Rep. 570.

claims against a person in his representative character be joined with claims against O. 2, r. 5. him personally—

- (1) unless the claims by or against him personally arise with reference to the estate which he represents, or
- (2) unless he was entitled to, or liable for, those claims *jointly* with the deceased person whom he represents.

The object of the rule is to prevent an executor or administrator from intermingling the assets of his testator with his own moneys (*m*).

Illustrations.

(a) *A* is a tenant for life of certain property. *B* is the remainderman. *A* gives a lease of the property to *C*. *A* dies leaving a will of which *B* is sole executor. Some months after *A*'s death, *B* sues *C* (1) for arrears of rent due to the estate of *A*, and (2) for rent due to him *personally* subsequent to *A*'s death. Here the first claim is by *B* as executor, and the second claim is by him *personally*. The claim by *B* personally does not arise with reference to the estate of *A* of which *C* is executor. The two claims therefore cannot be joined together in the same suit: *Tredgar v. Roberts* [1914] 1 K. B. 283.

(b) *A* dies leaving a will of which *B* is the executor. By his will *A* directs *B* to continue his business. The executor purchases for the purposes of *A*'s business certain goods from *C* in his own name. The first branch of the rule provides that *C* may in such a case sue *B* for the price of the goods, and may claim the price against *B* *personally*, or, in the alternative, against him as executor. It will be noted that in the case put above, the personal claim against *B* arises with reference to the estate of which he is the executor. But if *B* purchased certain goods from *C* as executor in the course of the administration of *A*'s estate, and other goods from *C* under a separate contract altogether in his own name and expressly for the purpose of his own business, *C* cannot join both claims against *B* in one suit (*n*).

(c) The second branch of the rule may be illustrated by the following case: *A* and *B* jointly purchase goods from *C*. *A* dies leaving a will of which *B* is the executor. Here *A* and *B* are jointly liable for the price of the goods. *C* may therefore sue *B* for the price in his (*B*'s) personal as well as representative character. If *A* and *B* had purchased goods from *C* under separate contracts, *C* ought to bring two separate suits against *B*, one as *A*'s executor to recover the price of the goods sold to *A*, and the other against *B* personally to recover the price of the goods sold to *B*.

Heir as such.—An heir may sue or be sued in his *personal* capacity or he may sue or be sued in his *representative* capacity. The words "claim by an heir as such" in this rule refer to a claim by him in his *representative* capacity, that is, as representing the estate of the deceased whose heir he claims to be (*o*).

Illustrations.

1. A Mahomedan dies leaving a widow and daughters by a predeceased wife. The widow sues the daughters (1) for her dower, and (2) for her share of the inheritance in her husband's estate. It is contended on behalf of the daughters that the first claim

(m) *Tredgar v. Roberts* [1914] 1 K. B. 283.

(n) See *Willicorth v. Darbishire* (1893) 41 W. R. 317.

(o) *Ahmad-ut-din v. Sikandar* (1896) 18 All. 259; *Ujjazaboo v. Mahomed* (1907) 31 Bom. 105.

O. 2, rr. 5-7. is by the widow *personally*, and that the second claim is by her *as an heir* and that two claims cannot be joined in one suit. This contention is not sound, for the second claim cannot be said to have been preferred *by an heir as such*. That claim is not made by her *as representing* her husband's estate and *for the benefit of the estate*, but *for her own and personal benefit*. The two claims may therefore be joined in one suit: *Ahmad-ud-din v. Sikandar* (1896) 18 All. 250.

2. A Hindu widow sues her husband's executors to recover (1) certain ornaments forming part of her *stridhanam* and (2) her share in her husband's estate. The suit is properly constituted: *Hafiznboo v. Muhomed* (1907) 31 Bom. 105; *Jankibai v. Shrinwasa* (1913) 38 Bom. 120.

6. Where it appears to the Court that any causes of actions joined in one suit cannot be conveniently tried or disposed of together, the Court may order separate trials or make such other order as may be expedient.

Power of Court to order separate trials.

Scope of the rule.—This rule does not apply to cases of *misjoinder*, but to cases where several causes of action have been *properly* joined in one suit and the causes of action so joined cannot be conveniently tried together (*p*). See notes to r. 3 above under the head "One plaintiff, one defendant, and two or more causes of action."

7. All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

Objections as to misjoinder.

ORDER III.

Recognized Agents and Pleaders.

O. 3, r. 1. 1. Any ~~appearance, application or act~~ in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf;

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

(*p*) *Muthappa v. Muthu* (1904) 27 Mad. 80 94.

Authority.—When a suit is brought by a person professing to act as another person's agent, the Court has the power to enquire into the agent's authority (g).

O. 3,
rr. 1-4.

Application for leave to sue in forma pauperis.—Such an application cannot be made by a recognized agent. See O. 33. r. 3.

12/10

2. The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

Recognized agents.

(a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties :

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts.

see

3. (1) Processes served on the recognised agent of a party shall be as effectual as if the same had been served on the party in person, unless the Court otherwise directs.

Service of process on recognised agent.

(2) The provisions for the service of process on a party to a suit shall apply to the service of process on his recognized agent.

Processes.—Processes include writs of summons and notices issued by the Court.

4. (1) The appointment of a pleader to make or do any appearance, application or act for any person shall be in writing, and shall be signed by such person or by his recognized agent or by some other person duly authorized by power-of-attorney to act in this behalf.

Appointment of pleader.

(2) Every such appointment, when accepted by a pleader, shall be filed in Court, and shall be considered to be in force until determined with the leave of the Court, by a writing

- O. 3** signed by the client or the pleader, as the case may be, and
rr. 4-6. filed in Court, or until the client or the pleader dies or until all proceedings in the suit are ended so far as regards the client.

(3) No advocate of any High Court established under the Indian High Courts Act, 1861, or of any Chief Court, and no advocate of any other High Court who is a barrister shall be required to present any document empowering him to act.

Delegation of authority by pleader.—Where a pleader cannot attend, he has no power to delegate his authority to another pleader (r).

“Until determined with the leave of the Court.”—An attorney’s retainers cannot be revoked by his client by a mere letter; it can only be revoked with the leave of the Court by a writing signed by the client and filed in Court, as provided in this rule (s).

5. Any process served on the pleader of any party or left at the office or ordinary residence of such pleader, and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person.

6. (1) Besides the recognized agents described in rule 2 any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process.

(2) Such appointment may be special or general and shall be made by an instrument in writing signed by the principal, and such instrument or, if the appointment is general, a certified copy thereof shall be filed in Court.

ORDER IV.

Institution of Suits.

- O. 4, r. 1.** **1. (1)** Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf.

(r) *Shirdyal v. Khetu* (1896) 20 Bom. 203.

(s) *Atul Chunder v. Lakshman* (1909) 36 Cal. 609.

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable. O. 4,
rr. 1, 2.

✕ 2. The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted.

Register of suits.

ORDER V.

Issue and Service of Summons.

Issue of Summons

1. (1) When a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified : O. 5,
rr. 1, 2.

Summons-

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim.

(2) A defendant to whom a summons has been issued under sub-rule (1) may appear-

(a) in person, or

(b) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(c) by a pleader accompanied by some person able to answer all such questions.

(3) Every such summons shall be signed by the Judge or such officer as he appoints. and shall be sealed with the seal of the Court.

2. Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement.

Copy or statement annexed to summons

O. 5,
rr. 3-6.

3. (1) Where the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified.

Court may order defendant or plaintiff to appear in person.

(2) Where the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance.

Consequence of non-attendance in person.—See O. 9. r. 12.

No party to be ordered to appear in person unless resident within certain limits.

4. No party shall be ordered to appear in person unless he resides—

- (a) within the local limits of the Court's ordinary original jurisdiction, or
- (b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate). less than two-hundred miles distance from the court-house.

5. The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly:

Summons to be either to settle issues or for final disposal.

Provided that, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit.

6. The day for the appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

Fixing day for appearance of defendant.

7. The summons to appear and answer shall order the defendant to produce all documents in his possession or power upon which he intends to rely in support of his case. O. 5,
rr. 7-11

Summons to order defendant to produce documents called on by him.

8. Where the summons is for the final disposal of the suit, it shall also direct the defendant to produce, on the day fixed for his appearance, all witnesses upon whose evidence he intends to rely in support of his case.

On issue of summons in final disposal, defendant to be directed to produce his witnesses.

Service of Summons

9. (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates.

Delivery or transmission of summons for service.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct.

10. Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court.

Mode of service

Object of service.—The object of the service of a summons in whatever way it may be effected (other than substituted service to which other considerations apply) is that the defendant may be informed of the institution of the suit in due time before the date fixed for the hearing (1). See notes to r. 17 below.

11. Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.

Service on several defendants.

Partners.—As to service on partners, see O. 30, r. 3.

(1) *Bhomasetti v. Umabai* (1897) 21 Bom. 223, 225

O. 5,
rr. 12-16.

12. Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.

Service to be on defendant in person when practicable, or on his agent.

13. (1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service.

Service on agent by whom defendant carries on business.

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or charterer.

Manager or agent personally carrying on business.—The manager or agent contemplated by this rule is one who has an *initiative and independent discretion*, albeit subject possibly to general orders for his guidance. A *mere servant* employed to carry out orders or to execute a particular commission, or a factor or common agent who is not identified with the firm for which he acts, is not such an agent (v).

14. Where in a suit to obtain relief respecting, or compensation for wrong to, immovable property, service cannot be made on the defendant in person, and the defendant has no agent empowered to accept the service, it may be on any agent of the defendant in charge of the property.

Service on agent in charge in suits for immovable property.

15. Where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.

Where service may be on male member of defendant's family.

Explanation.—A servant is not a member of the family within the meaning of this rule.

16. Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature

Person served to sign acknowledgment.

of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons. **O. 5, rr. 16, 17.**

17. Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, *Procedure when defendant refuses to accept service, or cannot be found.* cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

Service of Summons.—The Code prescribes three modes of service of summons upon a defendant. They are as follows.—

1. In the first case, the summons is served by delivering a copy thereof to the defendant personally, or to an agent or other person on his behalf, and by obtaining the signature of the person to whom the copy is delivered to an acknowledgment of service endorsed on the original summons. See rr. 10–16 and r. 18.
2. In the second case, that is, cases mentioned in r. 17, service is effected *without an order of the Court* by affixing a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and the Court has to declare after examination of the serving officer that the summons has been duly served. See rr. 17 and 19.
3. In the third case, that is, cases mentioned in r. 18, service is effected *after obtaining an order of the Court* by affixing a copy of the summons in some conspicuous place in the Court house and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit. Service so effected is as effectual as if it had been made on the defendant personally. This is called *substituted service*. See r. 18.

“After using all due and reasonable diligence.”—The present rule provides that the mode of service prescribed by it should not be resorted to *until* the serving officer has used all due and reasonable diligence to find the defendant, and the defendant could

O. 5. not be found. To justify substituted service, it must be shown that *proper efforts were made to find the defendants*, as, for instance, that the serving officer went to the place or places and at the times at which it was reasonable to expect he would be found (v). Thus, if a serving officer goes to a defendant's house, but does not find him there, and the defendant's adult son, who is in the house, refuses to accept service on behalf of the father, these facts by themselves do not justify the officer in effecting substituted service: he must, before effecting such service, inquire of the son as to where the defendant is and otherwise use due and reasonable diligence in finding the defendant (w). Mere temporary absence of the defendant does not justify the serving officer in affixing a copy of the summons on the door of the defendant's house (x).

Cannot find the defendant.—These words are wide enough to cover the case where the serving officer is not able to obtain access to a *purdhanashin* lady who has to be served, and cannot deliver or tender a copy of the summons to her (y).

18. The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

Endorsement of time and manner of service.

19. Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit: and shall either declare that the summons has been duly served or order such service as it thinks fit.

Examination of serving officer.

“Or order such service as it thinks fit.”—These words empower the Court, even when there has been a technical compliance with the provisions of r. 17, to order service in another mode, if the Court thinks fit to do so in the interests of justice. Thus where the person to be served is a *purdhanashin* lady, and a serving officer is not able to obtain access to her and he thereupon affixes a copy of the summons on the outer door of her dwelling house as provided by r. 17, though the service is properly effected, the Court may under this rule direct the service of summons by means of notice sent by registered post, so that the cover may in due course reach the lady herself (z).

(v) *Rajendra v. Jan Meah* (1899) 26 Cal. 101; *Kashirode v. Nahin Chandru* (1915) 10 C. W. N. 1231.
 (w) *Kassim v. Johurmull* (1916) 43 Cal. 417.
 (x) *Sakharam v. Padmakar* (1906) 39 Bom. 623.
 (y) *Abraham v. Donald* (1906) 29 Mad. 321.
 (z) (1915) 10 C. W. N. 1231, *supra*.

20. (1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

Substituted service.

Order 5,
rr. 20-2;

(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

Effect of substituted service.

(3) Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

Where service substituted, time for appearance to be fixed.

For any other reason.—Where by the custom in India a defendant (being a Hindu woman of rank) could not be personally served with a summons, the Judicial Committee allowed service to be substituted on her *Dewan* (chief servant) (a).

21. A summons may be sent by the Court by which it is issued, whether within or without the province, either by one of its officers or by post to any Court (not being the High Court) having jurisdiction in the place where the defendant resides.

Service of summons where defendant resides within jurisdiction of another Court.

22. Where a summons issued by any Court established beyond the limits of the towns of Calcutta, Madras, Bombay and Rangoon is to be served within any such limits, it shall be sent to the Court of Small Causes within whose jurisdiction it is to be served.

Service, within Presidency-towns and Rangoon, of summons issued by Courts outside.

23. The Court to which a summons is sent under rule 21 or rule 22 shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons

Duty of Court to which summons is sent.

(a) *Clark v. Mulluk* (1839) 2 M. L. A. 261, 268

O. 5, to the Court of issue, together with the record (if any) of its
rr. 23-26. proceedings with regard thereto.

X 24. Where the defendant is confined in a prison, the summons shall be delivered or sent by post or otherwise to the officer in charge of the prison for service on the defendant.

Service on defendant in prison.

X 25. Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate.

Service where defendant resides out of British India and has no agent.

Where Summons is sent by post.—This rule is to be read with S. 27 of the General Clauses Act 10 of 1897, by which it is provided that when any document is required by an Act passed after 11th March 1897 to be served by post, and the expression used is "send" [which is the expression used in the present rule], then, unless a different intention appears, [and no such intention appears in the present rule], the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. Reading the present rule with the said s. 27 the High Court of Bombay held in a case in which it appeared that the postal packet enclosing the summons was properly addressed to the defendant, and was registered, duly stamped and posted, but the packet was returned endorsed "refused", that the Court was entitled to draw the inference indicated in the said s. 27, and to hold that there was sufficient service (b).

Service in foreign territory through Political Agent or Court.

X 26. Where—

(a) in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor-General in Council, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

(b) the Governor-General in Council has, by notification in the *Gazette of India*, declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such

jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be a valid service, O. 5,
rr. 26-29.

the summons may be sent to such Political Agent or Court, by post or otherwise, for the purpose of being served upon the defendant; and, if the Political Agent or Court returns the summons with an endorsement signed by such Political Agent or by the Judge or other officer of the Court that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service.

The words italicized in cl (b) of this rule are new. They were added by the Second Repealing and Amending Act XVII of 1914.

27. Where the defendant is a public officer (not belonging to His Majesty's military or naval forces or his Majesty's Indian Marine Service), or is the servant of a railway company or local authority, the Court may, if it appears to it that the summons may be most conveniently so served, send it for service on the defendant to the head of the office in which he is employed, together with a copy to be retained by the defendant.

Service on civil public officer or on servant of railway company or local authority.
 Officer belonging to the Indian Marine Service.—An officer or mechanic in the employ of the Indian Marine Service is subject to exactly the same rule as every other person under the Code, that is to say, service upon him is to be effected in the manner prescribed by rr. 15 to 17 above (c).

28. Where the defendant is a soldier, the Court shall send the summons for service to his commanding officer together with a copy to be retained by the defendant.

29. (1) Where a summons is delivered or sent to any person for service under rule 24, rule 27 or rule 28, such person shall be bound to serve it, if possible, and to return it under his signature, with the written acknowledgment of the defendant and such signature shall be deemed to be evidence of service.

Duty of persons to whom summons is delivered or sent for service.

O. 5,
rr. 29, 30. (2) Where from any cause service is impossible, the summons shall be returned to the Court with a full statement of such cause and of the steps taken to procure service, and such statement shall be deemed to be evidence of non-service.

30. (1) The Court may, notwithstanding anything hereinbefore contained, substitute for a summons a letter signed by the Judge or such officer as he may appoint in this behalf, where the defendant is, in the opinion of the Court, of a rank entitling him to such mark of consideration.

(2) A letter substituted under sub-rule (1) shall contain all the particulars required to be stated in a summons. and, subject to the provisions of sub-rule (3), shall be treated in all respects as a summons.

(3) A letter so substituted may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit; and, where the defendant has an agent empowered to accept service, the letter may be delivered or sent to such agent.

ORDER VI.

Pleadings generally.

O. 6,
rr. 1, 2.

Pleading.

1. "Pleading" shall mean plaint or written statement.

Function of pleadings.—"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules [relating to pleadings] was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, *the whole meaning of the system is to narrow the parties to definite issues*, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing". To attain this end, the plaintiff should state in his plaint all the facts which constitute his cause of action. And the defendant also should state in his written statement the material facts on which he relies for his defence.

2. Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved,

Pleading to state material facts and not evidence.

and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures. O. 6, rr. 2-4.

Every pleading must state facts and not law.—A pleading must not set forth conclusions of law or of mixed law and fact: it is for the *Court* to declare the law arising upon the facts before it. The *parties* should only state the facts on which they rely for their claim or defence.

Every pleading must state only material facts, and not the evidence by which they are to be proved.—Every pleading must contain a statement of the material facts on which the party pleading relies, but not the evidence by which those facts are to be proved. No doubt, evidence too consists of facts, but there is a convenient nomenclature to distinguish the two. The material facts on which the party pleading relies his claim or defence are called *facta probanda*. The evidence or the facts by means of which they are to be proved are called *facta probantia*. Every pleading should contain only *facta probanda*, and not *facta probantia*.

3. The forms in Appendix A when applicable, and where they are not applicable, forms of the like character, as nearly as may be, shall be used for all pleadings.

Forms of pleading.

4. In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

Particulars to be given where necessary.

Object of particulars.—Although pleadings must now be concise, they must also be precise. For this purpose all necessary *particulars* must be embodied in the pleadings. If the particulars stated in the pleadings are not sufficiently specific, the other party may apply for further and better particulars under the next rule. The *object* of *particulars* is to prevent surprise at the trial by informing the opposite party what case he has to meet, to define and narrow the issues to be tried and so save unnecessary expense (d).

Fraud and coercion.—Where fraud is charged against the defendant, it is an acknowledged rule of pleading that the plaintiff must set forth the *particulars* of the fraud which he alleges. It is not enough to use such general words as "fraud," "deceit," or "machinations." "General allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice" (e). Where a plaintiff seeks relief on the ground of fraud, but the particulars of the fraud alleged are not set forth in the plaint, the plaint should

(d) *Spedding v. Fitzpatrick* (1888) 38 C. D. 410. (e) *Walsford v. The Mutual Society* (1880) App. Cas. 695, 697, per Lord Selborne, 1. C.

O. 6, rr. 4-6. be rejected under O. 7, r. 11, as not disclosing a cause of action (f). A charge of fraud must be substantially proved as laid, and when *one kind* of fraud is charged, *another kind* of fraud cannot, upon failure of proof, be substituted for it (g). The same rules apply where *coercion* is charged in the plaint (h).

If the particulars of fraud stated in the plaint are not sufficiently specific, the defendant may apply for further particulars under the next rule. Thus, where it is alleged by the plaintiffs that the defendants have made false entries in the plaintiffs' books for the purpose of defrauding them, the plaintiffs may be directed to furnish particulars specifying the entries charged to be false, and the nature of their objection to each item (i).

✓ 5. A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, may in all cases be ordered, upon such terms, as to cost and otherwise, as may be just.

Further and better statement, or particulars.

Application for particulars.—"The object of particulars is to prevent surprise at the trial and to limit the inquiry at the trial to the matters set out in the particulars. So I think particulars ought to be encouraged. They tend to *narrow the issues* (j)". If a party does not state in his pleading all the particulars required by r. 4, the other party may apply under this rule for further and better particulars.

6. Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.

Condition precedent.

Neither party need allege the performance of any condition precedent.—A agrees to build a house for B at certain rates specified in the contract. It is a condition of the agreement that payment to A should only be made upon a certificate signed by B's architect that so much is due. A demands payment upon completion of the building, but B refuses to pay. A sues B claiming Rs. 5,000. Here the obtaining of the architect's certificate is a *condition precedent* to A's right of action. The present rule provides that it is not necessary for A expressly to aver in his plaint that he has obtained the architect's certificate. Such averment, the rule says, shall be *implied* in his pleading. The rule further provides that if B intends to contest the fulfilment of the condition precedent, he must distinctly *specify the condition precedent* in his written statement. He must plead that the architect has not certified the amount claimed in the suit. If B does not plead the non-performance of the condition, it will be presumed

(f) *Gunga Narain v. Tiluckram* (1888) 15 Cal. 533, 15 I. A. 119; *Balnji v. Gangadhar* (1908) 22 Bom. 250; *Jyoti Prakash v. Jhonnnull* (1909) 30 Cal. 134.
(g) *Abdul Hossein v. Turner* (1887) 11 Bom. 620 14 I. A. 111.

(h) *Purushotam v. Pandurung* (1914) 39 Bom. 149
(i) *Newport Shipway & Co. v. Paynter* (1886) 34 C. D. 68.
(j) *Thompson v. Birkley* (1883) 31 W. R. [Eng.] 250 per Watkin Williams, J.

that the condition has been duly performed. But if *B* pleads non-performance, the burden of *proving* due performance will be on *A* as before.

O. 6,
rr. 6-9

7. No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of act inconsistent with the previous pleadings of the party pleading the same.

Departure.

Departure in pleading.—This rule provides against what is called “a departure in pleading.”

A plaintiff commences his suit by presenting a *plaint*. The defendant then puts in his *written statement* in answer to the plaintiff's claim. The plaintiff may then, with the leave of the Court, tender a *written statement* and the defendant may then, with like leave, tender an *additional written statement* (O. 8, r. 9).

The word “pleading” at the commencement of this rule refers to *subsequent pleadings*. Thus if a plaintiff alleges merely a *negligent* breach of trust in his *plaint*, any *written statement* that he may be permitted to present under O. 8, r. 9, must not assert that the breach of trust was *fraudulent* (k). This is a “new ground of claim,” and it can only be done by *amending* the *plaint*. Similarly, if the *written statement* alleges that the arbitrators *did not make any award*, any *additional written statement* that the defendant may be permitted to file under O. 8, r. 9, must not assert that the award *was not tendered by the proper time*, such an allegation is “inconsistent with the previous pleading,” “for it is one thing not to make an award, and another thing not to tender it when made.” (l).

8. Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.

Denial of contract.

Denial of contract.—Thus if *A* sues *B* on a contract, and *B* in his written statement *merely denies* the contract, such denial will be taken to mean only that there was *in fact* no such contract as alleged: it will not be construed as a denial of the *legality* of the contract. The result is that if *A* proves the contract sued upon, *B* will not be allowed to contend at the hearing that the contract is a *wagering contract* or that it is *illegal*, and therefore void. *B* ought specifically to plead in his written statement that the contract was a *wagering contract* (m).

9. Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

Effect of document to be stated.

(k) *K. J. An v. Corker* (1892) 20 L. R. Ir. 364, | (l) *Roberts v. Mariett* (1871) 2 Wms. Saund, 188
J. 7. | (m) *Wallis v. Lovie* [1901] 2 K. B. 195.

O. 6, rr. 9-13. **Precise words.**—In an action of libel or slander it is always necessary to set out the *exact* words alleged to be libellous (n).

10. Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

11. Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material.

Notice as part of cause of action.—Notice where it forms part of the cause of action, must be pleaded as a fact, *e.g.*, notice of suit proposed to be brought against the Secretary of State for India (s. 80), notice of dishonour of a bill of exchange, notice to a tenant to quit, etc. It is not necessary to set out the notice *verbatim* in the plaint.

12. Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

13. Neither party need, in any pleading, allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied (*e.g.*, consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim).

Presumptions of law.—A plaintiff need not, in his plaint, allege the consideration for which a bill of exchange was given to him when he sues *only on the bill*, for it will

be presumed in his favour that the bill was made for consideration (o). It is for the defendant to plead that there was no consideration for the bill. But if the plaintiff sues on the consideration as a substantive ground of claim, he must allege the consideration specifically.

O. 6,
rr. 13-16

14. Every pleading shall be signed by the party and his pleader (if any): Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

~~Pleading to be signed~~

(15) (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

Verification of pleadings

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

16. The Court may, at any stage of the proceedings, order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit.

Striking out pleadings.

Amending your opponent's pleading.—This rule deals with amendments which a party desires to be made *in his opponent's pleading*. The next rule deals with amendments which a party desires to make *in his own pleading*.

Unnecessary, scandalous, or embarrassing.—Thus, where in a suit against a local board, the plaintiff alleged that a member of the board had used his influence with the board for his own private interest, and that in consequence thereof the board had declined to meet the just demands of the plaintiffs, the allegations were ordered to be struck out (p). In such a case, the allegations are not only unnecessary, but they are scandalous. For the same reason, unnecessary allegations of dishonest conduct made

(o) See Negotiable Instruments Act 26 of 1881, s. 118. [(p) *Murray v. Epson Local Board* [1897] 1 Ch 35.

O. 6, against the defendant will be struck out under this rule (q). In an action to enforce
 rr. 16, 17. a compromise of a former action, it is *unnecessary and embarrassing* for the plaintiff to set out in the statement of claim the original disputes between the parties: such allegations will therefore be struck out (r). A pleading is *embarrassing* if it is so drawn that it is not clear what case the opposite party has to meet at the trial (s). But a pleading is not embarrassing merely because it is prolix (t).

• 17. The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Different kinds of amendment.—Hitherto we have dealt with four kinds of amendment. The present rule deals with one more. All these may be grouped together as follows:—

1. S. 152 [amendment of clerical and arithmetical mistakes in judgments, decrees and orders].
2. S. 153 [amendment of proceedings in a suit by the Court, whether moved thereto by the parties or not, for the purpose of determining the real question at issue between the parties].
3. O. 1, r. 10, sub-r. (2) [striking out or adding parties].
4. O. 6, r. 16 [amending your opponent's pleading: *compulsory* amendments].
5. O. 6, r. 17 [amending your own pleading: *voluntary* amendments].

Amending your own pleading.—The preceding rule deals with amendments which a party desires to be made in *his opponent's pleading*, as where the pleading contains irrelevant and scandalous matter, or where it may tend to prejudice, embarrass or delay the fair trial of the suit. The present rule deals with amendments which a party desires to make in *his own pleading*.

Leave to amend, when given.—As a general rule, leave to amend will be granted so as to enable the *real question in issue* between the parties to be raised on the pleadings, where the amendment will occasion *no injury to the opposite party, except such as can be sufficiently compensated for by costs* or other terms to be imposed by the order (u). It does not matter that the original omission arose from negligence or carelessness. However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. *There is no injustice if the other side can be compensated by costs* (v). "I have found in my experience," said Bowen, L. J., "that there is one panacea which heals every sore in litigation, and that is *costs*" (w). Thus a plaintiff in a suit for debt may be allowed to amend the plaint by setting out an acknowledgment passed to him by the defendant even after the defendant has filed his written statement raising the plea of limitation (x).

(g) *Brooking v. Maudslay* (1886) 55 L. T. 343.

(r) *Knowles v. Roberts* (1888) 38 C. D. 263.

(s) *British Land Association v. Foster* (1888) 4 Times Rep. 574.

(t) *Heap v. Marris* (1877) 2 Q. B. D. 630, 633.

(u) *Australian Steam Navigation Co. v. Smith* (1889) 14 App. Cas. 318, 320; *Kisandas v.*

Rachappa (1909) 33 Bom. 644, 655.

(v) *Clarapada v. Commercial Union Association* (1884) 32 W. R. [Eng.] 262, 263; *Weldon v. Neal* (1887) 19 Q. B. D. 394, 396.

(w) *Cropper v. Smith* (1884) 20 C. D. 700, 711.

(x) *Gunnaji v. Makanji* (1909) 34 Bom. 250.

Leave to amend, when refused.—It follows from what has been stated above O. 6, r. 17 that leave to amend should be refused—

- (1) where the amendment is not necessary for the purpose of determining the real questions in controversy between the parties, as where it is—
 - (i) merely technical, or
 - (ii) useless and of no substance;
- (2) where the amendment would occasion injury to the opposite party such as cannot be compensated for by costs;
- (3) where the amendment would introduce a totally different, new and inconsistent case, and the application is made at a late stage of the proceedings,
- (4) where the application for amendment is not made in good faith.

Of these four cases, only the second and third require some explanation.

Leave to amend will be refused where the amendment would cause injustice to the opposite party such as cannot be compensated for by imposing terms as to costs or otherwise (y)—Thus leave to amend will be refused, if the amendment will prejudice a right that has already accrued to the opposite party on the pleadings as then standing. *A* sued a tramway company for damages caused by their negligence in allowing their tramway to be in a defective condition. By their defence the company denied negligence. It was no part of the defence that the company were not the proper parties to be sued. More than six months after the delivery of the defence the company applied for leave to amend the defence by adding an allegation that by a contract between the company and the local authority of the district, the liability to maintain the roadway had been transferred to the local authority, and that the company had ceased to be responsible for the roadway. At the date of the application *A*'s remedy against the local authority had become time-barred. If the agreement had been pleaded earlier, *A* could have maintained an action against the board. Under these circumstances the application was refused. It is clear from the above facts that if the amendment were allowed, *A* might fail against the company, the company not being the proper defendants, and if *A* brought an action against the local authority, it would be too late. That would be an injury to *A* such as could not be compensated for by any costs that the Court might order the company to pay to *A*. "The test as to whether the amendment should be allowed," said Pollock, B., "is, whether or not the defendant can amend without placing the plaintiff in such a position that he cannot be recouped, as it were, by any allowance of costs or otherwise. Here the action would be wholly displaced by the proposed amendment, and I think it ought not to be allowed" (z).

Leave to amend a plaint should not be granted, in any event at the hearing of a suit if the amendment would convert the suit into another of a different and inconsistent character.—The question involved in the above proposition arises in this wise: *A* institutes a suit against *B*. *B* files his written statement. At the hearing of the suit, *A* finds that his case must fail as laid in the plaint, and that he can only succeed on a different case. He then applies for leave to amend the plaint. Should the leave be granted? It has been held under the corresponding English rule that no amendment should be allowed if it would "introduce an entirely different case from that which the defendant came

(y) *Edvain v. Cohen* (1899) 41 C. D. 563, 567
(1899) 43 C. D. 187.

(z) *Stewart v. North Metropolitan Tramway Co.*
(1880) 16 Q. B. D. 178.

O. 6, r. 17. to meet " (a), or, to put it in another form, if it would "change one action into another of a substantially different character" (b). The Indian cases on the subject are numerous. We deduce the following three rules from those cases:—

Rule I.—Where a plaintiff bases his claim upon a *specific legal relation* alleged to exist between him and the defendant, he may not be allowed to amend the plaint so as to base it on a different legal relation.

Note.—Even if the legal relation between the plaintiff and the defendant remains unchanged, the plaint will not be allowed to be amended if it completely alters the cause of action.

Rule II.—Where a plaintiff bases his claim on a *specific title*, he may not be allowed to amend the plaint so as to base it on a different title.

Note.—Even if the title by which the plaintiff claims remains unaltered, the plaint will not be allowed to be amended if it completely alters the cause of action.

Rule III.—When one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it.

Illustrations of Rule I.

1. *A*, alleging that *B* hired cargo boats from him, and that a balance of Rs. 3,000 was due to him on that account, sues *B* for the amount without any other prayer for relief. It is proved at the hearing that *B* did not himself hire the boats, but that he was merely *A*'s agent to find hires for the boats. *A* applies to amend his plaint by claiming an account from *B* on the footing that *B* was *A*'s agent. The amendment cannot be allowed, because in the one case the legal relation between *A* and *B* is that of *letter and hiree*, and, in the other, that of *principal and agent*: *Shobhastu v. Abdul* (1880) 5 Cal. 602.

2. *A*, who is *P*'s agent to manage certain property belonging to *P*, appoints *S* to act as a sub-agent for *P*, and gives him Rs. 1,000 belonging to *P*, for the payment of Government revenue and other purposes. *S* fails to account for the money. *P* sues *A* to recover the amount paid by *A* to *S* claiming the same on the ground that *S* was appointed sub-agent without *P*'s authority. It is found at the hearing that *S* was appointed sub-agent with *P*'s authority. *P* will not be allowed to amend the plaint so as to claim the said amount from *A* on the ground that *A* had not exercised ordinary prudence in selecting *S* as a sub-agent for *P*: *Hamilton v. Land Mortgage Bank* (1883) 5 All. 456. [This is an illustration of the proposition in the Note to Rule I. If the amendments were allowed, the legal relation between the plaintiff and the defendant, which is that of principal and agent, would no doubt remain unchanged, but the cause of action would be completely changed.]

Illustration of Rule II.

A sues *B* to recover certain property as the heir of *C*, who, he alleges, was the adopted son of *D*. The Court finds that *C*'s adoption was not valid. *A* then contends for the first time on appeal to the Privy Council that even if the adoption was not valid, he is entitled to recover the property as the heir of *D*. This is a totally new case, and *A* cannot in appeal set up an entirely new case: *Gopee Lal v. Chandrasee* (1872) 19 W. R. 12 I. A. Sup. Vol. 131.

(a) *Ellis v. Manchester Currying Co.* (1870) 2 C. P. D. 13, 16. | (b) *Releigh v. Goschen* (1898) 1 Ch. 73, 81.

Illustration of Rule III.

A, the official assignee of a deceased insolvent's estate, sues **B** for Rs. 1,50,000 alleged in the plaint to be unlawfully withheld from the estate in consequence of a payment fraudulently concealed from **A**'s predecessor in office. It is proved that **A**'s predecessor was aware of the payment. **A** applies to amend his plaint by alleging that, though his predecessor consented to the payment, such consent was illegal, as being a fraud of a different kind upon the Court. The amendment cannot be allowed, because to allege fraud of one kind and to substitute fraud of another kind is to convert the suit into one of an inconsistent character: *Abdool Hoosein v. Turner* (1887) 11 Bom. 620, 14 I. A. 111.

A written statement should not be allowed to be amended at the hearing so as to convert the defence into another of a different and inconsistent character.—As in the case of a plaint, so in the case of a written statement, the Court will not at the hearing allow any amendment that would involve “a complete change of front in the defence” (c).

Illustration.

A agrees to grant a lease of a brick-field to **B**. No lease is executed, but **B** enters into possession under the agreement. **B** then sues **A** for specific performance of the agreement, alleging that **A**, though frequently requested to do so, had neglected and refused to grant the lease. **A** denies that he was requested by **B** to grant the lease, and expresses his readiness to execute the lease. **A** also counterclaims for Rs. 1,500 by way of rent. After the suit is set down for trial, **A** applies for leave to amend his defence and counterclaim, and to join therewith a claim for the recovery of the land. The application must be refused. To allow **A** to amend would be to allow him to present “a totally distinct, new and inconsistent case”: *Clark v. Wray* (1886) 31 C. D. 68.

Amendment by adding a plea of fraud.—It is “the universal practice, except in the most exceptional circumstances, not to allow an amendment for the purpose of adding a plea of fraud where fraud has not been pleaded in the first instance” (d). Where facts supporting the charge of fraud are *disclosed in the cross-examination of the defendant*, leave may be given to amend by adding a plea of fraud (e).

At any stage of the proceedings.—Leave to amend may be granted at *any* stage of the proceedings. It may be granted in appeal [s. 107, sub-s. (2)], or even in second appeal (s. 103). In the undermentioned case (f), the plaintiff was allowed to amend his plaint in appeal before the Privy Council. It is open to the appellate Court to allow an amendment whether leave to amend was asked for in the Court below or not, and even when the Court below offered leave to amend, but the offer was declined (g).

18. If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall

(c) *Laird v. Briggs* (1880) 16 C. D. 440, 446.
 (d) *Bentley v. Black* (1893) 9 Times Rep. 580.
 (e) *Riding v. Hawkins* (1889) 14 P. D. 56.
 (f) *Mohammed Zahoor Ali Khan v. Nitai Kori*

(1867) 11 M. I. A. 468, 486.
 (g) *Ecklin v. Little* (1887) 19 Q. B. D. 394; *Kisan-das v. Rachappa* (1909) 33 Bom. 611.

- O. 6, r. 18. not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court.

ORDER VII.

Plaint.

- ✓ O. 7, rr. 1, 2. Particulars to be contained in plaint. 1. The plaint shall contain the following particulars :—

- (a) the name of the Court in which the suit is brought ;
- (b) the name, description and place of residence of the plaintiff ;
- (c) the name, description and place of residence of the defendant, so far as they can be ascertained ;
- (d) where the plaintiff or the defendant is a minor, or a person of unsound mind, a statement to that effect ;
- (e) the facts constituting the cause of action and when it arose ;
- (f) the facts showing that the Court has jurisdiction ;
- (g) the relief which the plaintiff claims ;
- (h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished ; and
- (i) a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of Court-fees, so far as the case admits.

2. Where the plaintiff seeks the recovery of money,
In money suits. the plaint shall state the precise amount claimed :

But where the plaintiff sues for mesne profits or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaint shall state approximately the amount sued for.

3. Where the subject-matter of the suit is immoveable property, the plaintiff shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaintiff shall specify such boundaries or numbers.

O. 7,
rr. 3, 4.

4. Where the plaintiff sues in a representative character, the plaintiff shall show not only that he has no actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.

When plaintiff sues as representative.

“Where the plaintiff sues in a representative character,”—Where a person dies leaving a will, the *executor* named in the will may obtain *probate* of the will. Where a person dies intestate, his *heirs* may apply for *letters of administration*. The person to whom letters of administration are granted is called *administrator*. The executor or administrator, as the case may be, of a deceased person, is his *legal representative* for all purposes, and all the property of the deceased vests in him as such. A suit by a person as executor or administrator of a deceased person is a suit by him in a *representative* character. There are some cases in which the law requires probate or letters of administration as the case may be, to entitle a person suing in a representative character to a decree in respect of the estate of the deceased. In a large majority of cases, however, it is not necessary to obtain probate or letters of administration to entitle a plaintiff suing in a representative character to a decree in respect of the estate of the deceased. This will be seen from the following statement of the law on the subject:—

1. *Europeans, Parsis, East Indians, Jews and other persons subject to the provisions of the Indian Succession Act X of 1865.*—When the deceased is a person to whom the provisions of the Succession Act apply, probate or letters of administration must be obtained, otherwise no decree will be passed in respect of any matter concerning the estate of the deceased: Succession Act, section 187 (as to probate), and section 190 (as to letters of administration).

The Succession Act applies to all natives of India other than Hindus, Mahomedans, and Buddhists: see s. 331 of the Act.

2. *Hindus subject to the provisions of the Hindu Wills Act XXI of 1870.*—Where a Hindu subject to the provisions of the Hindu Wills Act dies *leaving a will*, his executor is not entitled to a decree in respect of any matter concerning the estate of the deceased unless he has obtained probate of the will (see s. 2 of the Act which incorporates s. 187 of the Succession Act which requires probate). But where he dies *intestate*, his heirs may sue in respect of his property without obtaining letters of administration unless the suit is one to recover a *debt* due to the deceased, in which case either letters of administration or a succession certificate must be obtained before a decree can be passed in favour of the heirs: see Succession Certificate Act VII of 1889, s. 4.

The Hindu Wills Act applies to Hindus, Jains, Sikhs and Buddhists, when *either* the will is made within the territories subject to the Lieutenant-Governor of Bengal

O. 7, r. 4. or in the towns of Madras and Bombay, or the will, though made outside those places relates to immovable property situate in those places.

3. *Hindus not subject to the provisions of the Hindu Wills Act.*—These are governed by the provisions of the Probate and Administration Act V of 1881. The latter Act does not require probate or letters of administration, so that the executor of a Hindu not governed by the Hindu Wills Act may sue without obtaining probate, and his heirs may sue without obtaining letters of administration. But when the suit is to recover a *debt* due to deceased, no Court will pass a decree against the debtor, except on the production, by the person suing, of a probate or letters of administration or a succession certificate: see Succession Certificate Act VII of 1889, s. 4.

The Probate and Administration Act applies to all persons to whom the Indian Succession Act does not apply. It therefore applies to Mahomedans, and, subject to the provisions of the Hindu Wills Act, to Hindus.

4. *Mahomedans.*—Mahomedans are governed in matters of probate and administration by the provisions of the Probate and Administration Act. Hence the rules as to probate, letters of administration, and succession certificate in the case of Mahomedans are the same as in case (3) above.

5. *Native Christians.*—Up to the year 1901, Native Christians were governed by the provisions of the Indian Succession Act. Hence it was necessary, where the deceased left a will, that the executor should obtain *probate* before he could establish any right as executor to the property of the deceased (Succession Act, s. 187). And where the deceased died intestate, *letters of administration* were required before any right could be established to any part of the property of the deceased in a Court of Law (Succession Act, s. 190). In the year 1901, an Act was passed called the Native Christian Administration of Estates Act (VII of 1901), declaring *inter alia* that the provisions of section 100 of the Succession Act shall not apply to any part of the property of a Native Christian who has died intestate. The result therefore is exactly the same as in case (2) above, that is to say, if a Native Christian dies leaving a will, *probate* must be obtained to entitle the executor to obtain a decree in respect of the property of the deceased as provided by s. 187 of the Succession Act. But if he dies *intestate*, his heirs may sue in respect of his property without obtaining letters of administration, unless the suit is one to recover a *debt* due to the deceased, in which case either letters of administration or a succession certificate must be obtained before a decree can be made in favour of the heirs: see Native Christian Administration of Estates Act, s. 5.

“Has taken the steps.”—In cases to which the Probate and Administration Act, 1881, applies, it is necessary, where the suit is one for the recovery of a *debt* due to the deceased, that representation should be obtained to the estate of the deceased. But such representation is not a condition precedent to the institution of the suit. It is sufficient if it is obtained before the passing of the decree. It is so provided by the Succession Certificate Act, 1889, s. 4.

Suppose now that the deceased has left a will, and that the case is one governed by the Indian Succession Act, 1865, or the Hindu Wills Act, 1870, and that the suit is one to establish a right as executor or legatee. In such a case it has been held by the Privy Council that the grant of probate is not a condition precedent to the institution of the suit though it be one to establish a right as executor or legatee, and that the executor or legatee may institute the suit without obtaining probate, but that he will not be

entitled to a decree until he obtains probate of the will (*h*). But suppose the deceased has left no will, and the case is one governed by the Indian Succession Act, and the suit is one to establish a right to the property of the deceased. Is it necessary that letters of administration to the estate of the deceased should be obtained before the institution of the suit, or is it sufficient if they are obtained before the decree is passed. It has been held by the High Court of Bombay that if letters of administration are not obtained before the institution of the suit, and the plaint does not show that the plaintiff has obtained letters of administration, the plaint should be rejected on presentation; but if the plaint is not rejected, and the hearing has been allowed to proceed, there is nothing to prevent the Court from passing a decree for the plaintiff if the letters of administration are obtained before the decree (*i*). See Indian Succession Act, 1865, ss. 187 and 190.

O. 7.
rr 4-7.

5. The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

Defendant's interest and liability to be shown.

6. Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed.

Grounds of exemption from limitation law.

Grounds of exemption from limitation law.—These grounds are set forth in sections 12 to 20 of the Limitation Act, 1908. If no ground of exemption is shown in the plaint, and the suit appears from the statement in the plaint to be barred by limitation, the plaint will be rejected [sec. 11, cl. (d), *ibid*]. But a plaint should not be rejected merely because the exemption is not claimed *expressly*. All that the rule requires is that the plaint should *show the ground of exemption* (*g*).

7. Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.

Relief to be specifically stated.

Relief.—Every plaint must state specifically the relief which the plaintiff claims, whether it be damages, or specific performance, or injunction, or a declaration, or accounts, or the appointment of a receiver, or possession of land, or relief of any other kind. A plaintiff who omits, except with the leave of the Court, to sue for all the reliefs to which he may be entitled in respect of the same cause of action will not afterwards be allowed to sue for any relief so omitted [O. 2, r. 2, sub-r. (3)].

(*h*) *Chandra Kishore v. Prasanna Kumari* (1910) 38 Cal. 327, 38 I. A. 7 [a case under the Hindu Wills Act, 1870].

(*i*) *Sinha v. Hemingway* (1914) 38 Bom. 618.

Adm.-Gen. of Bengal v. Lalli (1908) 12 C. W. N. 738.

(*g*) *Raghu Nath v. Syed Samad* (1908) 12 C. W. N. 617.

O. 7, rr. 7-9. **General or other relief.**—Under the system of pleadings hitherto followed in India, it was usual to add in the plaint a prayer for general relief, called *general prayer*, which ran thus: "The plaintiff claims *such further or other relief* as the nature of the case may require." Under the present rule it is no longer necessary specifically to ask for such relief. Such relief may now always be given to the same extent as if it had been expressly asked for, provided it is not inconsistent with the other reliefs specifically claimed, as well as with the case raised by the pleading (l). In order, however, to entitle a plaintiff to a relief under the claim for general relief, it is necessary that the ground for such relief must be directed by the allegations in the plaint (l). "A plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings" (m). Thus where a plaintiff sues for a declaration of title to certain property under a deed of sale, he cannot be allowed to succeed on the basis of title by *adverse possession* (n).

Alternative relief.—Thus a plaintiff may in the same suit claim to have a partnership agreement with the defendant *cancelled* on the ground that he was induced to enter into it by the fraud of the defendant, or, in the alternative, for a *dissolution* of partnership and accounts (o).

There is nothing in law to prevent a plaintiff in a suit for pre-emption basing his claim in the alternative on contract, custom, or Mahomedan law (p); nor is there anything to prevent him in such a suit from setting up an alternative claim for possession as owner (q).

8. Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly.

9. (1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it; and, if the plaint is admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements.

(2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such

(k) *Gargill v. Bower* (1878) 10 C. D. 502, 508.

(l) *Jugal Kishore v. Kartic Chunder* (1894) 21 Cal. 116, 120-21.

(m) *Mohammed Zahoar v. Rutta Koer* (1897) 11 M. I. A. 408, 474.

(n) *Somasundaram v. Vadivelu* (1908) 31 Mad.

531.

(o) *Bagot v. Easton* (1877) 7 C. D. 1.

(p) *Muhammad v. Shams-ur-Nissa* (1914) 36 All. 456.

(q) *Bhagwati v. Parmeswar* (1914) 36 All. 476.

statements shall show in what capacity the plaintiff or defendant sues or is sued. O. 7,
rr. 9-11.

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

(4) The chief ministerial officer of the Court shall sign such list and copies or statements if, on examination, he finds them to be correct.

10. (1) The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

Return of plaint.

(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it. {

Procedure on returning plaint.

Court-fee.—Where a plaint is returned by a Court to be presented to the proper Court, the latter Court is bound to give credit for the fee levied by the former Court (r).

✓ Rejection of plaint. 11. The plaint shall be rejected in the following cases :—

(a) where it does not disclose a cause of action :

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so :

(c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped and the plaintiff on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court fails to do so :

(d) where the suit appears from the statement in the plaint to be barred by any law.

Clause (a).—Under the Code of 1882, s. 53, it was not obligatory upon the Court to reject a plaint if it did not disclose a cause of action. Under the present rule, the

O. 7, Court is bound to reject a plaint if it does not disclose a cause of action. As to the rr. 11-16. meaning of "cause of action", see notes to s. 20, "Cause of Action."

Clause (c): Where a plaint is written upon paper insufficiently stamped.
—If the plaintiff fails to supply the requisite stamp-paper within the period fixed by the Court, the plaint may be rejected under this rule, even after it has been numbered and registered as a suit. The reason is that the power to reject a plaint under this rule is not exhausted when the plaint has been admitted and registered (c).

12. Where a plaint is rejected the Judge shall record an order to that effect with the reasons for such order.

13. The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

Where rejection of plaint does not preclude presentation of fresh plaint

Documents relied on in plaint.

14. (1) Where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

Production of document on which plaintiff sues

(2) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

List of other documents.

The penalty for not producing the documents referred to in this rule is that prescribed in r. 18 below, and not the rejection of the plaint (1).

15. Where any such document is not in the possession or power of the plaintiff, he shall, if possible, state in whose possession or power it is.

Statement in case of documents not in his possession or power

16. Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost and an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument,

Suits on lost negotiable instruments

the Court may pass such decree as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint. O. 7.

17. (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where the document on which the plaintiff sues is an entry in a shopbook or other account, in his possession or power, the plaintiff shall produce the book or account at the time of filing the plaint, together with a copy of the entry on which he relies.

(2) The Court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification; and, after examining and comparing the copy with the original, shall, if it is found correct, certify it to be so, and return the book to the plaintiff and cause the copy to be filed.

Bankers' Books Evidence Act 18 of 1891.—This Act provides a special mode of proof of entries in bankers' books by dispensing with the production of the books. S. 4 of the Act provides that a *certified copy* of any entry in a banker's book is to be received as *prima facie* evidence of the existence of such entry, and that it should be admitted as evidence of the matter contained therein to the same extent as the *original* entry.

18. (1) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(2) Nothing in this rule applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any cause set up by the defendant or handed to a witness merely to refresh his memory.

In what cases leave may be granted under this rule.—The object of the rule is to provide against false documents being set up after the institution of a suit. In those cases, therefore, where there is no doubt of the existence of a document at the date of the suit, the Court should admit the document in evidence even though the document was not produced with the plaint or entered in the list of documents annexed to the plaint (u).

(u) *Devadas v. Pirajada Begam* (1884) 8 Bom 377.

ORDER VIII.

Written Statement and Set-off.

- O. 8,
rr 1-4. 1. The defendant may, and, if so required by the Court, shall at or before the first hearing or within such time as the Court may permit, present a written statement of his defence.

Written statement.

Written statement.—The written statement must contain, and contain only a statement in a concise form of the *material facts* on which the party pleading relies for his defence, but *not the evidence* by which those facts are to be proved, see O. 6, r. 2.

2. The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

New facts must be specially pleaded.

3. It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

Denial to be specific.

“Deal specifically with each allegation of fact.”—The defendant must take each fact which is alleged against him separately, and say that he *admits* it, or *denies* it, or *does not admit* it. Every allegation of fact in the plaint will be taken to be admitted if it is not denied specifically or by necessary implication, or stated to be not admitted (r. 5). Where a defendant is not in a position to *admit* an allegation made in the plaint, nor in a position to *deny* it categorically, as where he is not aware of the truth or otherwise of the allegation, the proper form to use is “the defendant *does not admit*, etc.”

“Except damages.”—The defendant need not plead to damages. No denial is necessary as to damages claimed.

4. Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount but he must deny, that he received that sum or any

Evasive denial.

part thereof or else set out how much he received. And if an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances. O. 8,
rr. 4, 5.

Evasive denial.—Where the plaint alleges that “the defendant offered to the plaintiff’s agent a bribe of Rs. 500 on 17th July, 1908, at the defendant’s office,” it is an evasive traverse for the defendant to plead: “The defendant did not offer to the plaintiff’s agent a bribe of Rs. 500 on the 17th July, 1908, at his office”; for the defendant might have offered any *other sum* on *another day* and in *another place*. Here the *point of substance* is that a bribe was offered. The details as to the amount, time and place are only *circumstances*. The defendant should plead that he never offered a bribe of Rs. 500 or any other *sum* to the plaintiff’s agent on 17th July, 1908, or any other day (*v*).

5. Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or Specific denial. stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability :

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

Admissions of fact in pleadings.—The first paragraph of this rule states what amounts to admissions of fact in a pleading. Rule 3 requires that the defendant must deal *specifically* with each allegation of fact of which he does not admit the truth. The present rule provides that every allegation of fact in the plaint, if not denied in the written statement, or stated to be not admitted, shall be taken to be admitted by the defendant. *A* sues *B* to recover a sum of money from *B*. For the purpose of saving limitation *A* in his plaint relies upon a letter alleged to have been written by *B* to *A*. *B* in his written statement says: “The plaintiff’s suit is not in time. The suit is not saved from the bar of limitation by the letter put in by the plaintiff.” The letter must be taken as admitted by *B*, and it is not necessary for *A* to prove the letter (*w*).

A plaintiff who claims a decree must *prove* all the material facts on which he relies in support of his claim. The importance of the present rule lies in this that, since facts that have been admitted *need not be proved*, it is not necessary for the plaintiff to prove facts which have been *expressly admitted* by the defendant or which *must be taken to have been admitted* by him within the meaning of this rule (see Evidence Act, 1872, s. 58). The admission itself being a proof, no other proof is necessary. In the case, however, of facts which are *taken to be admitted* by the defendant within the meaning of this rule, that is, in the case of *implied admissions*, the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission. That is to say, the Court may require the plaintiff to adduce such proof of the fact as it would have been necessary for him to adduce if no such admission had been made.

O. 8, r. 6.

6. (1) Where in a suit for the recovery of money the defendant claims to set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards, unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set off.

Particulars of set off to be given in written statement.

(2) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off: but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

Effect of set-off.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

Illustrations.

(a) *A* bequeaths Rs. 2,000 to *B* and appoints *C* his executor and residuary legatee. *B* dies and *D* takes out administration to *B*'s effects. *C* pays Rs. 1,000 as surety for *D*; then *D* sues *C* for the legacy. *C* cannot set off the debt of Rs. 1,000 against the legacy for neither *C* nor *D* fills the same character with respect to the legacy as they fill with respect to the payment of the Rs. 1,000.

(b) *A* dies intestate and in debt to *B*. *C* takes out administration to *A*'s effects and *B* buys part of the effects from *C*. In a suit for the purchase-money by *C* against *B*, the latter cannot set off the debt against the price, for *C* fills two different characters, one as the vendor to *B*, in which he sues *B*, and the other as representative to *A*.

(c) *A* sues *B* on a bill of exchange. *B* alleges that *A* has wrongfully neglected to insure *B*'s goods and is liable to him in compensation which he claims to set off. The amount not being ascertained cannot be set off.

(d) *A* sues *B* on a bill of exchange for Rs. 500. *B* holds a judgment against *A* for Rs. 1,000. The two claims being both definite pecuniary demands may be set off.

(e) *A* sues *B* for compensation on account of trespass. *B* holds a promissory note for Rs. 1,000 from *A* and claims to set off that amount against any sum that *A* may recover in the suit. *B* may do so, for, as soon as *A* recovers, both sums are definite pecuniary demands.

(f) *A* and *B* sue *C* for Rs. 1,000. *C* cannot set off a debt due to him by *A* alone.

(g) *A* sues *B* and *C* for Rs. 1,000. *B* cannot set off a debt due to him O. 8, r. 6 alone by *A*.

(h) *A* owes the partnership firm of *B* and *C* Rs. 1,000. *B* dies, leaving *C* surviving. *A* sues *C* for a debt of Rs. 1,500 due in his separate character. *C* may set off the debt of Rs. 1,000.

Conditions under which set-off may be claimed.—A defendant may claim a set-off under this rule under the following conditions :—

(a) The suit must be one for the recovery of money.

As respects the amount claimed to be set-off, it must be—

(b) an ascertained sum of money [see ill. (c), (d) and (e)] which is legally recoverable ;

(c) recoverable by the defendant or by all the defendants, if more than one [see ill. (g)] ;

(d) recoverable by the defendant from the plaintiff or all the plaintiffs if more than one [see ill. (f)] ;

(e) it must not exceed the pecuniary limits of the jurisdiction of the Court in which the suit is brought ;

(f) both parties must fill, in the defendant's claim to set-off, the same character as they fill in the plaintiff's suit [see ill. (a), (b), and (h)].

(a) **The suit must be one for the recovery of money.**—In *Nan Karay v. Ko Hlaw* (x), their Lordships of the Privy Council observed that it was doubtful whether a suit for an *account* was a suit for *money*. In a subsequent Allahabad case it was held that a suit for a dissolution of partnership with a prayer that such *balance* as might be found due to the plaintiff upon taking the partnership accounts might be paid to him, was a suit for *money*, and that a plea of set-off might therefore be raised by the defendant in such a suit (y).

(b) **The amount to be set off must be an ascertained sum of money and not damages undetermined.**—With this read ill. (c), (d), and (e) to the rule. In ill. (d) and (e) the claim is an ascertained sum ; not so in ill. (c), where the amount proposed to be set off is for unliquidated damages. In the case mentioned in ill. (c) the defendant may bring a cross-suit against the plaintiff. In ill. (d), the amount proposed to be set off by *B* is the amount of a decree, and this may be set off against *A*'s claim, though *B* may not have taken any steps to enforce the decree (z).

Equitable set-off.—We now proceed to consider cases in which the defendant may be allowed to set off even an *unascertained* sum which sounds in damages. Those are cases where the cross-demands arise out of *one and the same transaction*, or are so connected in their nature and circumstances that they can be looked upon as part of one transaction. In such cases Courts of Equity in England have held that it would be inequitable to drive the defendant to a separate cross-suit, and that he might be allowed to plead a set-off though the amount may be *unascertained*. Such a set-off is called an *equitable* set-off, as it is allowed by Courts of *Equity*, as distinguished from a *legal* set-off which is allowed at *common law* in respect of *ascertained* sums only.

(x) (1886) 13 Cal. 124, 13 I. A. 48.

(y) *Ramjiwan v. Chand Mal* (1888 10 All. 587.

(z) *Bharat v. Rameshwar* (1908) 30 Cal. 1066.

O. 8, r. 6.

Illustrations.

1. *A* agrees to sell, and *B* agrees to purchase, 200 bales of wool. *B* takes delivery of 170 bales, and is ready and willing to take delivery of the rest, but *A* fails to deliver them. *A* sues *B* for the price of the 170 bales. *B* claims to set off the damages sustained by him by reason of *A*'s failure to deliver the remaining bales. *B* is entitled to claim the set-off, as the claim arises out of the same transaction: *Kishorchand v. Madhourji* (1880) 4 Bom. 407; *Niaz v. Durga* (1893) 15 All. 9; *Nand Ram v. Ram Prasad* (1905) 27 All. 145.

2. *A* sues *B*, his master, for Rs. 800 being arrears of salary. *B* claims to set off Rs. 625, being the loss sustained by him by reason of neglect and misconduct on the part of *A* as his servant. *B* is entitled to claim the set-off, as his claim arises out of the same relation from which *A*'s claim arose, namely, that of master and servant: *Chisholm v. Gopal Chander* (1889) 16 Cal. 711. In a recent case the High Court of Allahabad took a different view. In the case the servant sued the master for arrears of salary, and the master claimed to set off damages alleged to have been sustained by him by reason of the servant having left service without giving previous notice. The Court disallowed the claim to set off, stating that damages could not be the subject-matter of a set-off under this rule: *Victoria Mills Co. v. Brij Mohan* (1917) 39 All. 362.

The amount claimed to be set off must be legally recoverable.—It has been held by the High Court of Calcutta in cases where the plaintiff's claim and the defendant's claim related to the same property or estate, that the defendant's claim to set-off, though barred by limitation, may be entertained as an equitable set-off. It has thus been held that in a suit by an heir against his co-heirs for his one-sixth share of the estate of the deceased, the latter are entitled to set off one-sixth of the Government revenue paid by them in respect of the estate, though a separate suit by them to recover from the plaintiff the proportionate part of the revenue payable by him would be barred by limitation (a). The contrary, however, was assumed in an Allahabad case (b).

(c) A separate debt cannot be set off against a joint and several debt. Thus in ill. (g), *B* cannot set off the debt due to him alone by *A*, for it is a separate debt, while the suit is to recover a joint and several debt. It has similarly been held that in a suit by a company against its directors, no individual director is entitled to set off the amount due to him alone from the company (c).

(e) The amount claimed to be set off must not exceed the pecuniary limits of the jurisdiction of the Court in which the suit is brought.—*A* sues *B* in a Presidency Small Cause Court for Rs. 1,000. *B* claims to set off a sum of Rs. 2,700, and claims judgment for Rs. 1,700. The Small Cause Court has no jurisdiction to try the question of set-off, the value being above Rs. 2,000 (d).

(f) Same character.—Ills. (a) and (b) are cases in which the parties do not fill the same character.

The following are cases in which the parties fill the same character :—

(1) A suit is brought by a Hindu son as the heir and representative of his father to recover from *B* certain debt due to the father. *B* claims to set off a debt due to him by *A*'s father. *B* may do so, for both the parties fill the same character (e).

(a) *Ramdhar Singh v. Permanand* (1913) 19 C. W. N. 1183; *Sheo Sharan v. Mohabir Pershad* (1905) 32 Cal. 576.
(b) *Pragji Lal v. Maxwell* (1885) 7 All. 284. See also *Bachchan Lal v. Banarsi Das* (1913) 85 All. 238.

(c) *New Fleming Co. v. Kesouji* (1885) 9 Bom. 373, 403-404.
(d) *Brijendra v. Budge-Budge Jute Mill Co.* (1893) 20 Cal. 527.
(e) *Chennappa v. Raghunatha* (1892) 15 Mad. 29.

(2) *A* sues *B* to recover Rs. 235 due on account of goods supplied to *B*. *B* claims to set off Rs. 287 due to him in respect of his wages as Gumasta in *A*'s shop. *B* is entitled to claim the set-off (f). O. 8,
rr. 6-10.

7. Where the defendant relies upon several distinct grounds of defence or set-off founded upon separate and distinct facts, they shall be stated as far as may be. separately and distinctly.

Defence or set-off founded on separate grounds.

8. Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off may be raised by the defendant or plaintiff, as the case may be, in his written statement.

New ground of defence.

✓ 9. No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.

Subsequent pleadings.

10. Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

Procedure when party fails to present written statement called for by Court.

ORDER IX.

Appearance of Parties and Consequence of Non-appearance.

1. On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court.

Parties to appear on day fixed in summons for defendant to appear and answer.

O. 9, r. 1.

O. 9,
rr. 2-5.

2. Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the Court-fee or postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed :

Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs

Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent.

3. Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

Where neither party appears, suit to be dismissed.

4. Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his not paying the Court-fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

Plaintiff may bring fresh suit or Court may restore suit to file.

5. (1) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails for a period of one year from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons and to satisfy the Court that he has used his best endeavours to discover the residence of the defendant who has not been served, or that such defendant is avoiding service of process, the Court may make an order that the suit be dismissed as against such defendant.

Dismissal of suit where plaintiff, after summons returned unserved, fails for a year to apply for fresh summons

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

6. (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then— O. 9,
rr. 6-7.

Procedure when only plaintiff appears. (a) if it is proved that the summons was duly served, the Court may proceed *ex parte* :

When summons duly served. (b) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant ;

When summons not duly served. (c) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

Decree ex-parte.—If the defendant does not appear, and it is proved that the summons was duly served upon him, the Court may proceed *ex parte*, that is to say, it may proceed to hear the plaintiff's case in the absence of the defendant. If the plaintiff makes out a *prima facie* case, the Court may pass a decree for the plaintiff. A decree passed against a defendant on his failure to appear at the hearing is called an *ex parte* decree. If the plaintiff fails to make out a *prima facie* case, the Court may dismiss the plaintiff's suit. "Every Judge in dealing with an *ex parte* case should take good care to see that the plaintiff's case is at least *prima facie* proved." The mere absence of the defendant does not of itself justify the presumption that the plaintiff's case is true (g). It is to be noted that there is no power in the Court to pass a decree *ex parte* before the returnable date mentioned in the summons (h).

As to the remedy open to a defendant against whom a decree is passed *ex parte*, see r. 13 below.

7. Where the Court has adjourned the hearing of the suit *ex parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise be heard

Procedure where defendant appears, on day of adjourned hearing and assigns good cause for previous non-appearance.

(g) *Amit Nath v. Roy Dhurpat* (1871) 15 W. R. 503; *Ross & Co. v. Seriven* (1910) 43 Cal. 1001, at pp. 1013, 1016, 1023.
(h) *Dhirajlal v. Hormnaji* (1906) 32 Bom. 534.

O. 9, in answer to the suit as if he had appeared on the day fixed
rr. 7-9. for his appearance.

8. Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

Procedure where defendant only appears.

Non-appearance of plaintiff.—All that a defendant is entitled to under this rule is to have the plaintiff's suit dismissed. He is not entitled to call any evidence at all, even though it be to disprove charges of fraud or the like that may have been made against him in the plaint (i).

This rule does not apply where the non-appearance of the plaintiff is owing to his death. Where a sole plaintiff dies before the hearing of a suit, and the suit is dismissed for non-appearance under this rule, the fact of his death not being known to the Court, there is inherent jurisdiction in the Court under s. 151 to set aside the dismissal, and thus rectify the mistake which has been inadvertently made. It is then for the legal representative of the plaintiff to apply to be brought on the record under O. 22, r. 3 (j).

9. (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

Decree against plaintiff by default bars fresh suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

Meaning of "appearance."—A plaintiff or a defendant will be said to have "appeared" on the day fixed for the hearing of the suit, if he appears—

(1) *in person*, or

(2) *by a pleader* either himself able to answer all material questions relating to the suit, or accompanied by some person able to answer such questions [O. 5, r. 1, sub-r. (2)].

(4) *Kesri Chand v. National Jute Mills Co.* (1912) 40 Cal. 119. | (5) *Raja Debi Bakhsh v. Habib Shah* (1913) 40 I. A. 151.

First, as regards Appearance of a party in person.—The mere presence of a party O. 9, r. 9 in Court at the hearing is sufficient to constitute "appearance" within the meaning of this Order. It does not matter for what purpose he appears, or what action he takes on the appearance. A plaintiff appearing and applying for an *adjournment* on the ground that his witnesses are not present, will be deemed to have "appeared." If the application is refused, and the suit is dismissed, owing to his inability to establish his case in the absence of witnesses, the dismissal is not one under r. 8, for the plaintiff *did appear*, and he cannot therefore avail himself of the provisions of this rule (k). Similarly, a defendant appearing and applying for an *adjournment* on the ground that he had no time to prepare his case, will be said to have "appeared." If the application is refused, and a decree is passed against him *owing to his unpreparedness to defend the suit*, the decree is not *ex parte* under r. 6, for he *did appear*, and he cannot therefore avail himself of the provisions of r. 13 (l).

Next, as regards Appearance of a party by a pleader.—Different considerations arise when a party is *not personally* present in Court, but is represented by a pleader. The question then is whether he has "appeared" by his pleader. Appearance by a pleader within the meaning of this Order consists, like appearance by a party in person, of mere presence in Court: it means appearance by a pleader "duly instructed and able to answer all material questions relating to the suit," or by a pleader "accompanied by some person able to answer all such questions" [O 5, r. 1]. Hence a party cannot be said to "appear" by a pleader, if the pleader appears at the hearing, and states that though he has filed his vakalatnama, he has *not received any instructions* from his client with regard to the case, and that he is therefore unable to go on with the suit (m). Similarly, a party cannot be said to "appear by a pleader, if the pleader has *no instructions other than to apply for an adjournment*, and, on the adjournment being refused withdraws from the suit, stating that he has no further instructions (n). In neither case can it be said that the party appeared by a pleader *duly instructed and able to answer all material questions relating to the suit*. But what if the party himself is also present in Court in such a case? According to the Madras High Court the party cannot be said in such a case to have "appeared" (o); according to the Bombay High Court he must be deemed to have "appeared," for notwithstanding the non-appearance of the party's pleader duly instructed to answer material questions, the Court can, under O. 10, r. 2, ask the party questions relating to the suit and can examine his witnesses or suggest that he should instruct some other pleader to examine the witnesses.

A pleader appears at the hearing on behalf of a plaintiff, and applies for an adjournment on the ground that he had no time to prepare himself with the case or on the ground that the papers being left with his senior, he could not proceed with the case. The application is refused, and the pleader being unable to go on with the case, the suit is dismissed. Can it be said under these circumstances that the plaintiff *appeared by a pleader*? It has been held in the undermentioned cases that the plaintiff *must* be deemed to have *appeared by a pleader*, and that the order of dismissal could not therefore be said to be one made under r. 8 so as to entitle the plaintiff to apply under this

(k) *Soonderlal v. Goorprasad* (1899) 23 Bom. 414.

(l) *Woopendra v. Nabin* (1899) 17 W. R. 370.

(m) *Shankar v. Radha* (1893) 20 All. 195.

(n) *Soonderlal v. Goorprasad* (1899) 23 Bom. 414;

Latta v. Nand Kishore (1900) 22 All. 66;

Cooke v. Coal Co. (1904) 8 C. W. N. 621;

Salish Chandra v. Ahara J'nad (1907) 34

Cal. 403; *Gopala Row v. Maria Susaya*

(1907) 30 Mad. 274; *Ramanuja v. Runga-*

sami (1908) 18 Mad. L. J. 51.

(o) *Ermail v. Haji Jan Mahomed* (1909) 33 Bom. 475.

O. 9, rr. 9-12. rule (p). It is difficult to see how the plaintiff can be said in such a case to have appeared by a pleader, when the pleader, not being prepared to go on with the case, could not answer *material questions relating to the suit*. See O. 5, r. 1, sub-r. (2).

Fresh suit in respect of the same cause of action.—If the plaintiff fails to appear, and the suit is in consequence dismissed under r. 8, he is precluded from bringing a fresh suit in respect of the *same* cause of action. Thus if *A* sues *B* for damages for breach of a contract, and the suit is dismissed for default of *A*'s appearance, *A* cannot bring a fresh suit to recover damages for breach of the same contract, *A*'s proper remedy in such a case is either to apply for a review, or still better to apply under this rule for an order to set aside the dismissal. But if the cause of action in the subsequent suit is *different* from that in the first suit, the subsequent suit will not be barred under the provisions of this rule (q). Thus if *A* sues *B* for the *rent* of certain lands, and the suit is dismissed for default of *A*'s appearance under r. 8, the order of dismissal will not operate as a bar to a suit by *A* against *B* for possession of the lands (r).

Execution proceedings.—Where an application for setting aside a sale in execution is dismissed for default, it may be restored under this rule (s).

Appeal.—An appeal lies from an order *rejecting* an application under this rule [O. 43, r. 1, cl. (c)]. It does not make any difference that the order is made by a High Court Judge (t).

10. Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit.

Procedure in case of non-attendance of one or more of several plaintiffs.

11. Where there are more defendants than one, and one or more of them appear and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

Procedure in case of non-attendance of one or more of several defendants.

12. Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or shows sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the

Consequence of non-attendance, without sufficient cause shown, or party ordered to appear in person.

(p) *Ramchandra v. Madhav* (1892) 16 Bom. 23; *Charanji v. Kundan* (1898) 20 All. 294; *Patinhare v. Yellur* (1903) 26 Mad. 267. See these cases criticised in *Satish Chandra v. Alara Prasad* (1907) 34 Cal. 403, 411, 414.

(q) *Shankar v. Daya Shankar* (1889) 15 Cal. 422, 15 I. A. 66; *Chand Kour v. Partab Singh* (1889) 10 Cal. 98, 15 I. A. 156.
(r) *Gobind v. Afzul* (1883) 9 Cal. 426.
(s) *Dejani v. Hemanta* (1915) 19 C. W. N. 758
(t) *Mailhura v. Haran* (1916) 43 Cal. 837.

provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear. O. 9, rr. 12, 13.

Setting aside Decrees ex parte.

13. In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

Grounds on which *ex parte* decree may be set aside.—These are stated in the second paragraph of the rule, the one being that the summons was not duly served upon the defendant (*u*), and the other that though the summons was duly served, the defendant was prevented by sufficient cause from appearing when the suit was called on for hearing (*v*). When a summons was served upon a *purdanashin* lady to whom the serving officer was not able to obtain access by affixing a copy of the summons on the outer door of her dwelling house under O. 5, r. 17, and it appeared that the lady had no knowledge of the suit against her, the Court set aside the *ex parte* decree passed against her on the ground that she was prevented by "sufficient cause" from appearing at the hearing of the suit (*w*).

Proviso to the Rule.—As a general rule the power conferred upon the Court by the proviso to the rule is exercised in cases where the decree is *one and indivisible*.

Illustrations.

*B, C and D, who constitute a joint Hindu family, execute a ^{joint} mortgage of their joint property in favour of A. A sues B, C and D to enforce the mortgage. B and C are not served with the summons, but D is served. None of the defendants appear at the hearing and a decree *ex parte* is passed against all the defendants for a sale of the mortgaged property. B and C apply to set aside the decree on the ground that the summons was not served upon them. Here the decree being one and indivisible, the Court may set aside the decree not only as against B and C, but also as against D, though he was served with the summons and there was no sufficient cause for his non-appearance: Ajodhya Pershad v. Sheo Pershad (1900) 5 C. W. N. 58; Ashfaq Husain v. Gauri Sahai (1911) 33 All. 264, 38 I. A. 37.*

(u) *Fakhr-ud-Din v. Ghafur-ud-Din* (1901) 23 All. 99; *Bhura Mal v. Har Kishan* (1902) 24 All. 383.

(v) *Somayya v. Subbamma* (1903) 26 Mad. 599.
(w) *Kashirode v. Nabin Chandra* (1915) 10 C.W.N. 1231.

O. 9, r. 14.

~~No decree to be set aside
without notice to opposite
party.~~

14. No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party.

ORDER X.

Examination of Parties by the Court.

O. 10,
rr. 1-4.

1. At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of facts as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

Ascertainment whether
allegations in pleadings are
admitted or denied.

2. At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied, may be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

Oral examination of party,
or companion of party.

Object of examination under this rule.—The object of examination under this rule is not to take evidence or ascertain what is to be the evidence in the case, but to determine the matters in dispute between the parties (x).

3. The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

Substance of examⁿation
to be written.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl. (2)].

4. (1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2, refuses or is unable to answer any material

Consequence of refusal or
inability of pleader to
answer.

question relating to the suit which the Court is of opinion **O. 10, r. 4** that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

Direct that such party shall appear in person.—Under this rule, an order directing a party to appear in person can only be made if the pleader who represents him has refused or is unable to answer material questions (y).

ORDER XI.

Discovery and Inspection.

✓ 1. In any suit the plaintiff or defendant by leave of the **O. 11, r. 1**.

Discovery by Interrogatories.

Court may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

Discovery by way of answers to interrogatories.—Every party to a suit is entitled to know the nature of his opponent's case (2), so that he may know beforehand what case he has to meet at the hearing (a). But he is not entitled to know the facts which constitute exclusively the evidence of his opponent's case, the reason being that it would enable an unscrupulous party to tamper with his opponent's witnesses, and to manufacture evidence in contradiction, and so share his case as to defeat justice (b). The nature of a plaintiff's case is disclosed in his plaint. The nature of a defendant's case is disclosed in his written statement. But a plaint or a written statement may

(y) *Satu v. Hanmantrao* (1890) 23 Bom. 318.

(z) *Saunders v. Jones* (1877) 7 C. D. 493.

(a) *Marriot v. Chamberlain* (1880) 17 Q. B. D. 154.

(b) *Bombay v. Low* (1850) 16 C. D. 63, 65; *Re Strachan* (1893) 1 Ch. 439, 445, 447-48.

O. 11, rr. 1, 2. *not sufficiently disclose the nature of a party's case. In such a case, either party may administer questions or interrogatories in writing to the other through the Court. Interrogatories may also be administered by a party to his opponent to obtain admissions from him to facilitate the proof of his own case. The party to whom the interrogatories are administered must answer them in writing and on oath (r. 8). This is called discovery by way of answers to interrogatories; the party by his answers discovers or discloses the nature of his case.*

A sues B to recover Rs. 5,000, being the amount of a hundi alleged to have been drawn by B in consideration of Rs. 5,000 lent by A to B. B is entitled to discovery of the form in which the loan is alleged to have been made, and of the time and place the hundi was drawn and accepted, and the time and place and the names and addresses of the persons by whom it was presented. All these are material facts which constitute the plaintiff's case (c).

What interrogatories may be allowed.—Interrogatories are allowed for the following purposes :—

1. *To ascertain the "nature" of your opponent's case or the material facts constituting his case.*
2. *To support your own case, either—*
 - (a) *directly, by obtaining admissions, or*
 - (b) *indirectly, by impeaching or destroying your adversary's case.*

What interrogatories may not be allowed.—These may be divided into three classes :—

1. *A party is not entitled to administer interrogatories for obtaining discovery of facts which constitute "exclusively" the "evidence" of his adversary's case or title.*
2. *A party is not entitled to interrogate as to any confidential communications between his opponent and his legal advisers.*
3. *A party is not entitled to exhibit interrogatories which would involve disclosures injurious to public interests.*

Distinction between pleadings and interrogatories.—Interrogatories are not, like pleadings, confined to the material facts on which the parties rely in support of their claim or defence; for interrogatories may be administered not only to ascertain the nature of your opponent's case, but to obtain admissions from him of every thing which is material on the pleadings, so as to facilitate the proof of your own case and thus save yourself the expense of proving facts admitted by your opponent in answer to the interrogatories.

2. On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court. In deciding upon such application, the Court shall take into account any offer, which may be made

Particular interrogatories to be submitted.

by the party sought to be interrogated, to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs.

O. 11,
rr. 2-6.

Objection to answer.—The allowance by a Judge of interrogatories to be administered to a party does not amount to a decision that the party is bound to answer them, but leaves him at liberty to take any objection to answering which he might otherwise have taken (*d*). See rr. 6-7.

3. In adjusting the costs of the suit inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court, either with or without an application for inquiry that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

4. Interrogatories shall be in Form No. 2 in Appendix C, with such variations as circumstances may require.

5. Where any party to a suit is a corporation or a body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly.

Delivery of interrogatories to an officer of a corporation.—A corporate body cannot answer for itself, and it is necessary that some officer should answer for it. His answer is the answer of the Company, and can be read against the Company.

6. Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited *bona fide* for the purpose of the suit, or that the matters inquired

Objections to interrogatories by answer.

(*d*) *Peck v. Ray* (1894) 3 ch. 282.

O. 11. into are not sufficiently material at that stage, or on any
rr. 6-11. other ground, may be taken in the affidavit in answer.

Scandalous interrogatories.—"Certainly nothing can be scandalous which is relevant" (e). Interrogatories which tend to incriminate a party are not scandalous, if they are relevant (f).

"Fishing" Interrogatories not allowed.—The questions asked must not be "fishing," that is to say, they must refer to some definite and existing state of circumstances, and must not be put merely in the hope of discovering something which may help the party interrogating to make out some case (g). For an instance of "fishing interrogatories," see *Ali Kader v. Gobind Dass* (h).

7. Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous: and any application for this purpose may be made within seven days after service of the interrogatories.

Setting aside and striking out interrogatories.

8. Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as the Court may allow.

Affidavit in answer, filing.

9. An affidavit in answer to interrogatories shall be in Form No. 3 in Appendix C, with such variations as circumstances may require.

Form of affidavit in answer.

10. No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court.

No exception to be taken.

11. Where any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination, as the Court may direct.

Order to answer or answer further.

(e) *Fisher v. Owen*. (1878) 8 G. D. 645, 653, per Cotton, L. J.
(f) *Altkusen v. Labouchere* (1878) 3 Q. B. D. 654.

(g) *Gourley v. Plimsoll* (1873) L. R. 8 C. P. 362; *Hennessey v. Wright* (No. 2) (1890) 24 Q. B. D. 445, 448, 449.
(h) (1890) 17 Cal. 840, 842-843.

12. Any party may, without filing any affidavit, apply O.11, r.12
 to the Court for an order directing any
 other party to any suit to make discovery
 on oath of the documents which are or
 have been in his possession or power, relating to any matter
 in question therein. On the hearing of such application the
 Court may either refuse or adjourn the same, if satisfied that
 such discovery is not necessary, or not necessary at that stage
 of the suit, or make such order, either generally or limited
 to certain classes of documents, as may, in its discretion, be
 thought fit: Provided that discovery shall not be ordered
 when and so far as the Court shall be of opinion that it is not
 necessary either for disposing fairly of the suit or for saving
 costs.

Discovery and production of documents.—Having dealt with discovery by way of answer to interrogatories, we now proceed to consider another species of discovery called *discovery of documents*. The parties to a suit may have in their possession or power *documents relating to the matters in question in the suit*. These documents may be divided into two classes :—

- (i) those which the adversary is entitled to inspect, and
- (ii) those which he is not entitled to inspect.

The adversary is entitled to inspection of all documents except those comprised in class (ii).

Documents comprised in class (ii) are described below under the head “Grounds of objection to production of documents.” But how is inspection to be obtained? If *A* wants to inspect documents in the possession of *B* which he is entitled to inspect, it is clear that he cannot inspect them unless they are produced by *B*. *A* must therefore call upon *B* to produce the documents. But how can *A* do this, unless he knows what documents are in the possession or power of *B*? To enable him to obtain this information, *A* is entitled to *discovery* from *B* of the documents in his possession or power. For this purpose, *A* may apply to the Court for an order requiring *B* to make an affidavit, called *affidavit of documents*, stating what documents are in his possession or power relating to the matters in dispute in the suit. On the order being made *B* is bound to make his affidavit of documents. If he fails to do so, he will be subjected to the penalties specified in r. 21 below. After the affidavit of documents is made by *B* disclosing the documents, *A* may require *B* to produce for his inspection such of the documents as he is in law entitled to inspect.

Contents of affidavit of documents.—Where a party is ordered to make his affidavit of documents, he must *set forth* in the affidavit all documents which *are or have been* in his possession or power relating to all matters in question in the suit. As to documents which *are not, but have been*, in his possession or power he must state what has become of them and in whose possession they are in order that the opposite party may be enabled to get production from the persons who have possession of them. For the same reason, if there are any documents in which he has a *joint* property with

- O. 11, other persons not before the Court, he must state the names of those persons. Rule
 rr. 12, 13. 13 provides that every affidavit of documents should also specify which of the documents
 therein *set forth* the declarant objects to *produce* for the inspection of the opposite party
 together with the grounds of such objection. These grounds are three in number and are
 given below. The Court will go into these grounds when it is called upon to make an
 order for *production* of the documents in a party's possession for the inspection of the
 opposite party (r. 14).

Grounds of objection to production of documents.—There are three grounds on which production of documents can be resisted as of right. (1) as disclosing the party's evidence, (2) as being within the doctrine of legal professional privilege and (3) as being injurious to public interests.

Non-disclosure of documents.—It is open to a litigant to refrain from producing any document that he considers irrelevant. If the other litigant is dissatisfied, it is for him to apply for an affidavit of documents, and he can obtain inspection and production of all that appear to him in such affidavit to be relevant and proper. If he fails to do so, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents. It is for the litigant who desires to rely on the contents of documents to put them in evidence in the usual and proper way; if he fails to do so, no inference in his favour can be drawn as to the contents thereof (i).

Conclusiveness of affidavit of documents.—If a party states in his affidavit of documents that he has no documents relating to the matters in question in the suit other than those set forth in the affidavit, his oath is conclusive, and the other party cannot cross-examine upon it nor adduce evidence to contradict it. The reason is that in all questions of discovery the oath of the party giving the discovery is conclusive as against the party claiming the discovery. To this, however, there are two exceptions. The one is where the Court is satisfied from (1) the pleadings, or (2) the affidavit of documents itself, or (3) the documents referred to therein, that there is a reasonable probability that the party has other relevant documents in his possession (j). The other exception is where the party making the affidavit has misconceived his case so that the Court is practically certain that if he had acted on a proper view of the law he would have disclosed further documents (k). In either case the Court may require the party to make a *further affidavit* of documents.

Several plaintiffs or several defendants.—Where there are several plaintiffs or several defendants, *all* must join in making the affidavit of documents, unless some specific reasons to the contrary are shown. The fact that some of the parties reside in England is no reason why they should be excused from making such affidavit (l).

Affidavit of documents from a co-defendant.—An affidavit of documents may be required by a defendant from a co-defendant, if there is an issue joined between them, but not otherwise (m).

13. The affidavit to be made by a party against whom such order, as is mentioned in the last preceding rule, has been made, shall specify which (if any) of the documents therein

Affidavit of documents.

(i) *Bilos Kunwar v. Desraj* (1915) 37 All. 557, 566, 42 I. A. 202, 206.

(j) *Kent Coal Concessions v. Duguid* [1910], 1 K. B. 204.

(k) *British Association of Glass Bottle Manufacturers v. Nettleford* [1912] A. C. 709.

(l) *Iyrie v. Shivshankar* (1897) 15 Bom. 7.

(m) *Anand Rao v. Budra* (1893) 17 Bom. 384.

mentioned he objects to produce, and it shall be in Form No. 5 O. 11. in Appendix C, with such variations as circumstances may require. rr. 13-16

14. It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

Production of documents.—Under this rule the Court has no discretion to refuse an order for production unless the documents are privileged (n).

15. Every party to a suit shall be entitled at any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

Inspection of documents referred to in pleadings and affidavits.—Rules 15 to 18 are confined to documents mentioned in the pleadings or affidavits. They were evidently intended to give the opposite party the same advantage as if the documents referred to had been fully set out in the pleadings (o).

16. Notice to any party to produce any documents referred to in his pleading or affidavits shall be in Form No. 7 in Appendix C, with such variations as circumstances may require.

(n) *Wallace v. Jefferson* (1878) 2 Bom. 453; 230.
Balamoney v. Ramasami (1907) 30 Mad. | (o) *Quiller v. Heally* (1883) 23 C. D. 42, 50.

O. 11,
rr. 17, 18.

17. The party to whom such notice is given shall, within ten days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in Form No. 8 in Appendix C, with such variations as circumstances may require.

Usual place of custody—*A*, who owns a ginning factory at Broach, agrees with *B* in Bombay to gin *B*'s cotton in his factory at Broach. *B* sues *A* in Bombay for damages for breach of the contract, and requires inspection of *A*'s books in Bombay. *A* offers to give inspection at Broach where the books are kept. *B* is not entitled to inspection in Bombay, for Broach is the place where the books are kept (*p*).

18. (1) Where the party served with notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the Court may on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit: Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

(2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

(*p*) See *Keraldas v. Pestonji* (1881) 5 Bom. 487.

Sub-rule (2).—This sub-rule provides for the inspection amongst others of documents not disclosed in the affidavit of documents, and the Court may under this sub-rule direct a party to give inspection of such documents. The principle that an affidavit of documents is conclusive as to the documents set forth therein is no answer to an application under this sub-rule for inspection of documents not disclosed therein (q).

19. (1) Where inspection of any business books is applied for, the Court may, if it thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations: Provided that, notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made.

Verified copies.

(2) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

(3) The Court may, on the application of any party to a suit at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been, in his possession or power; and, if not then in his possession, when he parted with the same and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the suit, or to some of them.

20. Where the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought

Premature discovery.

O. 11,
Fr. 20-22. depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

Determination of issue to decide upon right to inspection.—The object of the rule is to enable the Court to decide an *issue* in a suit, as distinguished from the suit itself, for the purposes of discovery (*r*).

21. Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly.

Dismissal of suit.—It is only when the default is wilful, and as a last resort, that a suit will be dismissed or a defence struck out under this rule (*s*). If the parties concerned are *purda-nashin* ladies, this should be taken into account before making the order (*t*).

Contempt.—Besides the consequences laid down in this rule, a party before a High Court who has failed to answer or give inspection is liable to be committed for contempt by that Court. The power to commit for contempt of the Court's order can only be exercised by Chartered High Courts (*u*). Courts other than Chartered High Courts have no such power.

22. Any party may, at the trial of a suit, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always that in such case the Court may look at the whole of the answers, and if it shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, it may direct them to be put in.

(*r*) *Ahmedbhoy v. Vallebhoy* (1882) 6 Bom. 572.
(*s*) *Assenoolia v. Abdool* (1883) 9 Cal. 523.

(*t*) *Behari Lal v. Habiba Bibi* (1886) 8 All 267.
(*u*) *Hassanbhoy v. Cowasji* (1883) 7 Bom. 1.

23. This Order shall apply to minor plaintiffs and defendants, and to the next friends and guardians for the suit of persons under disability. O. 11, r. 23.

Order to apply to minor.

Prior to this rule the practice of the different High Courts as to discovery from minors and persons of unsound mind was not uniform. As to next friends and guardians for the suit, see O 32 below

ORDER XII.

Admissions.

1. Any party to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party. O. 12, rr. 1-4.

Notice of admission of case
of

Admissions.—Rule 1 deals with admission of a case. Rule 2 deals with admission of documents. Rule 4 deals with admission of facts. The object of obtaining admissions is to do away with the necessity of proving facts that are admitted [see Evidence Act, s 38]

2. Either party may call upon the other party to admit any document saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense.

Notice to admit document

3. A notice to admit documents shall be in Form No. 9 in Appendix C, with such variations as circumstances may require.

Form of notice

4. Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of

Notice to admit facts

O. 12,
rr. 4-6. such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs: Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

5. A notice to admit facts shall be in Form No. 10 in Appendix C, and admissions of facts shall be in Form No. 11 in Appendix C, with such variations as circumstances may require.

6. Any party may at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for determination of any other question between the parties: and the Court may upon such application make such order, or give such judgment, as the Court may think just.

Scope of the rule.—This rule enables either party at any stage of the suit to move for judgment on the admissions which have been made by the other side. Either party may, by availing himself of this rule, get rid of so much of the suit as to which there is no controversy. The rule, however, is permissive: it does not preclude a party who does not avail himself of it and proceeds to trial in the ordinary way, from relying at the trial on the admissions made by the opposite party (v).

At the same time, it must be noted that a party who moves for judgment upon admissions in a pleading must accept as true all the allegations therein contained. *A* sues *B* for infringement of a patent, claiming injunction and damages. *B* by his written statement admits ten instances of infringement, but denies any further infringement. *A* thereupon moves for judgment upon the admission in the written statement. *A* is entitled to an injunction and to damages as to the ten instances only, but no others. He is not entitled to an inquiry for the purpose of ascertaining whether *B* has committed any other infringement (w).

(v) *Tildesley v. Harper* (1877) 7 C. D. 403.
(w) *United Telephone Co. v. Donohoe* (1880) 31

C. D. 399.

7. An affidavit of the pleader or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof is required. O. 12,
rr. 7-9.

8. Notice to produce documents shall be in Form No. 12 in Appendix C, with such variations as circumstances may require. An affidavit of the pleader, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served.

Notice to produce documents.—It is always desirable, when a document is in the possession or power of the opposite party, to give him notice to produce the same, for unless such notice is given, secondary evidence of the document cannot be given: see Indian Evidence Act. 1872, s. 65, cl. (a), and s. 66.

9. If a notice to admit or produce specifies documents which are not necessary, the cost occasioned thereby shall be borne by the party giving such notice.

ORDER XIII.

Production, Impounding and Return of Documents.

1. (1) The parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced. O. 13, r. 1.

(2) The Court shall receive the documents so produced: provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

"Shall produce at the first hearing."—This rule has been enacted to prevent fraud by the late production of suspicious documents. But no suspicion can attach to

O. 13, rr. 1-4. certified copies of public documents, such as records of Government or records of judicial proceedings. Such copies therefore may be received in evidence though they have not been produced at the first hearing (x). 'See r. 2.

2. No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing.

3. The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

Rejection of irrelevant or inadmissible documents.—Questions as to the admissibility of evidence should be decided as they arise, and should not be reserved until judgment in the case is given (y).

When a Court is doubtful as to whether a document is admissible or not, and its decision is open to appeal, it is *better to admit* than to exclude the documents (z).

A document may be *relevant*, and yet it may be *inadmissible* as where it is not stamped or registered. See Stamp Act, 1899, s. 35; Registration Act, 1908, s. 49, cl. (c).

4. (1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:

- (a) the number and title of the suit,
 - (b) the name of the person producing the documents,
 - (c) the date on which it was produced, and
 - (d) a statement of its having been so admitted;
- and the endorsement shall be signed or initialled by the Judge.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted

(x) *Ranchhod v. Secretary of State* (1898) 22 Bom. 173; *Talevar Singh v. Bhagwan Das* (1908) 12 C. W. N. 312.

(y) *Jadu v. Bhabotoram* (1890) 17 Cal. 173;

Ramjilun v. Oghore Nath (1898) 25 Cal. 401.
(z) *Kali Kishore v. Bhuson* (1891) 18 Cal. 201, 17 I. A. 159

for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge. O. 13,
rr. 4-6.

5. (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where Endorsements on copies of admitted entries in books, accounts and records a document admitted in evidence in the suit is an entry in a letter book or a shop-book or other account in current use, the party on whose behalf the book or account is produced may furnish a copy of the entry.

(2) Where such a document is an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished—

- (a) where the record, book or account is produced on behalf of a party, then by that party, or
- (b) where the record, book or account is produced in obedience to an order of the Court acting of its own motion, then by either or any party.

(3) Where a copy of an entry is furnished under the foregoing provisions of this rule, the Court shall, after causing the copy to be examined, compared and certified in manner mentioned in rule 17 of Order VII, mark the entry and cause the book, account or record in which it occurs to be returned to the person producing it.

Bankers' Books Evidence Act.—See notes to O. 7, 1. 17.

~~X~~ 6. Where a document relied on as evidence by either party is considered by the Court to be Endorsements on documents rejected as inadmissible in evidence inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of rule 4, sub-rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge.

O. 13,
rr. 7-9.

7. (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.

Recording of admitted
and return of rejected
documents.

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the person respectively producing them.

8. Notwithstanding anything contained in rule 5 or rule 7 of this Order or in rule 17 of Order VII, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit.

Court may order any do-
cument to be impounded.

9. (1) Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under rule 8, be entitled to receive back the same,—

Return of admitted docu-
ments.

(a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and

(b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of:

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original is required to do so:

Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless.

(2) On the return of a document admitted in evidence a receipt shall be given by the person receiving it.

10. (1) The Court may of its own motion, and may O. 13,
in its discretion upon the application of rr. 10, 11.
any of the parties to a suit, send for, either
~~Court may send for papers from its own records, or from other Courts.~~
from its own records or from any other
Court, the record of any other suit or
proceeding, and inspect the same.

(2) Every application made under this rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit.

11. The provisions herein contained as to documents shall, so far as may be, apply to all other
~~Provisions as to documents applied to material objects.~~
material objects producible as evidence.

ORDER XIV.

Settlement of Issues and Determination of Suit on Issues of Law or on Issues agreed upon.

1. (1) Issues arise when a material proposition of fact O. 14, r. 1
or law is affirmed by the one party and
~~Framing of Issues.~~
denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

O. 14,
rr. 1, 2. (4) Issues are of two kinds : (a) issues of fact, (b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

Of the framing of issues.—The plaint and written statement in a suit are called *pleadings* (O. 6, r. 1). Section 58 of the Evidence Act enacts that no fact need be proved at the hearing which a party has *admitted* by his *pleadings*, unless the Court requires proof thereof. *Issues* are to be framed in respect only of those facts which have been *denied* or *not admitted*. When an issue is framed as to a proposition of fact, it is said to be an *issue of fact*; when an issue is framed as to a proposition of law, it is said to be an *issue of law*.

Object of framing issues.—The object of framing issues is to direct the attention of the parties to the principal questions on which they are at variance, as also to bring such questions clearly before the Court, so that the Court may know which questions it has to determine to decide the case. Besides this, there is another advantage that attaches to the system of framing issues, namely, the exclusion of irrelevant evidence. As stated by their Lordships of the Privy Council, “Whatever system of pleading may exist, the sole object of it is that each side may be fully alive to the questions that are about to be argued, in order that they may have an opportunity of bringing forward such *evidence* as may be *appropriate to the issues*” (a). All evidence must be relevant to the issues. No evidence should be admitted that is foreign to the issues. Hence great care should be taken in framing issues: they must not be too general, and they must be framed in such a way that the attention of the parties may be sufficiently directed to the main questions of fact necessary to be decided, so that it may not be open to them to say that they were prevented from adducing evidence by the form of issues (b).

2. Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

(a) *Sayad Muhammad v. Fattah Muhammad* (1893) 22 Cal. 321, 330, 22 I. A. 4. (b) *Oolagappa v. Arbuthnot* (1875) 14 B. L. R. 115, 1 I. A. 268.

Materials from which
issues may be framed

3. The Court may frame the issues from all or any of the following materials:—

O. 14,
rr. 3-5.

- (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties;
- (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;
- (c) the contents of documents produced by either party.

Issues must not be inconsistent with pleadings.—It is a fundamental rule of law that the decision in a suit is to be founded upon a case entirely to be found in the pleadings. 'The pleadings must be consistent with the case finally made.' And since the decision in a suit proceeds upon the allegations made in that suit, it follows that the issues must in all cases be consistent with the pleadings. (c) Hence the Court should be careful to see that no issues are framed which are inconsistent with the pleadings. Thus if a plaintiff sues to set aside a document on the ground that it was *not executed* by him, and if that is a defence, the Court should not raise an issue as to whether the document was *not executed* or *executed with influence*. The latter issue presupposes that the document was *executed*, while the plaintiff's case is set up in the pleadings that it was *not executed* by him at all.

4. Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit it may adjourn the framing of the issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

5. (1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

(c) *Ba mchunder v. Shamachurni* (1866) 11 M.L. 47. (d) *Mahar v. Jalsh v. Honsrai* (1888) 15 Cal. 684, 15 I.A. 81.

O. 14,
rr. 5-7.

May amend the issues or frame additional issues. The Court should not frame an additional issue so as to convert a suit or defence of one character into a suit or defence of a different and inconsistent character. Thus if *A* sues *B* for damages for wrongful occupation of his land, treating *B* as a trespasser, he should not be allowed to raise an additional issue claiming rent of the land from *B*, treating him as his tenant (e). But if a suit is brought on a mortgage, and it transpires at the hearing that the witnesses to the mortgage deed were not present at its execution, but had put their names on the document on the acknowledgment by the executant of his signature, the mortgage deed is not valid at all, and it is therefore perfectly competent to the Judge to frame an additional issue as to whether the deed of mortgage was valid under s. 59 of the Transfer of Property Act, though the invalidity of the deed is not set up as a defence in the written statement. Every Court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties (f).

6. Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that upon the finding of the Court in the affirmative or the negative of such issue,—

Questions of fact or law
may by agreement be stated
in form of issues.

- (a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement :
- (b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct ; or
- (c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.

Court, if satisfied that
agreement was executed in
good faith, may pronounce
judgment.

7. Where the Court is satisfied, after making such inquiry as it deems proper,—

- (a) that the agreement was duly executed by the parties,

(e) *Narayan v. Hari* (1889) 13 Bom. 604.

(f) *Shamji Patter v. Abdul Kadir* (1912) 35 Mad 607, 39 L. A. 218.

(b) that they have a substantial interest in the decision **O. 14, r. 7.**
of such question as aforesaid, and,

(c) that the same is fit to be tried and decided,
it shall proceed to record and try the issue and state its finding
or decision thereon in the same manner as if the issue had been
framed by the Court ;

and shall upon the finding or decision on such issue,
pronounce judgment according to the terms of the agreement ;
and, upon the judgment so pronounced, a decree shall follow.

ORDER XV.

Disposal of the Suit at the first hearing.

1. Where at the first hearing of a suit it appears that the **O. 15.**
parties are not at issue on any question of **rr. 1-3.**
Parties not at issue. law or of fact, the Court may at once
pronounce judgment.

2. Where there are more defendants than one, and any
one of the defendants is not at issue with
One of several defendants
not at issue. the plaintiff on any question of law or of
fact, the Court may at once pronounce
judgment for or against such defendant and the suit shall
proceed only against the other defendants.

Admission of claim by one of several defendants.—*A* sues *B* and *C* upon a
promissory note jointly passed by them. *B* appears and admits the claim, and a decree
is passed against him. The decree against *B* is no bar to the further prosecution of the
suit against *C* (*g*).

3. (1) Where the parties are at issue on some question
of law or of fact, and issues have been
Parties at issue. framed by the Court as hereinbefore
provided, if the Court is satisfied that no further argument
or evidence than the parties can at once adduce is required upon
such of the issues as may be sufficient for the decision of the
suit, and that no injustice will result from proceeding with the
suit forthwith, the Court may proceed to determine such issues,

O. 15, and, if the finding thereon is sufficient for the decision, may
rr. 3, 4. pronounce judgment accordingly, whether the summons has
been issued for the settlement of issues only or for the final
disposal of the suit :

► Provided that, where the summons has been issued for
the settlement of issues only, the parties or their pleaders are
present and none of them objects.

(2) Where the finding is not sufficient for the decision,
the Court shall postpone the further hearing of the suit, and
shall fix a day for the production of such further evidence, or
for such further argument as the case requires.

4. Where the summons has been issued for the final
disposal of the suit and either party fails
Failure to produce evi-
dence. without sufficient cause to produce the
evidence on which he relies, the Court may
at once pronounce judgment, or may, if it thinks fit, after
framing and recording issues, adjourn the suit for the produc-
tion of such evidence as may be necessary for its decision upon
such issues.

ORDER XVI.

Summoning and Attendance of Witnesses.

O. 16, 1. At any time after the suit is instituted the parties may
r. 1. obtain, on application to the Court or to
Summons to attend to
give evidence or produce
documents. such officer as it appoints in this behalf,
summonses to persons whose attendance
is required either to give evidence or to produce documents.

**Witness-summons not to be refused unless it amounts to an abuse
of the process of the Court.**—A party is entitled as of right to summonses
to witnesses (h). So long as the application is made *after* the institution of the suit,
the Court is bound to issue the summonses. It does not matter that the party had him-
self originally undertaken to bring his witnesses and has failed to do so (i). Nor does
it matter that the application is made at such a late stage of the proceedings that the
witnesses cannot be present in Court before the final disposal of the suit (j). The Court
may in either of these cases refuse to *adjourn* the hearing for the attendance of the wit-

(h) *Bai Kali v. Alarakh* (1891) 15 Bom. 80.
(i) *Pandurang v. Keshavn* (1852) 6 Bom. 742.

(j) *Krishna v. Profab Chauder* (1881) 7 Cal. 360.

nesses, but it has no power to refuse to issue summonses (l). The only case in which the Court has power to refuse to issue summonses is where the application is not mere *bonâ fide* as when a decree-holder attaches property belonging to a *multh*, and on the head of the *multh* objecting to the attachment applies to summon him as his own witness with the sole object of putting pressure upon him, by requiring his personal attendance in Court, to relinquish his claim. In such a case the Court may, in the exercise of its inherent power to prevent the abuse of its own process [s. 151], refuse to issue the summons (l).

O. 16,
rr. 1-4.

2. (1) The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

Expenses or witness to be paid into Court on applying for summons.

(2) In determining the amount payable under this rule, the Court may in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

Expert.

(3) Where the Court is subordinate to a High Court, regard shall be had, in fixing the scale of such expenses, to any rules made in that behalf.

Scale of expenses

Travelling and other expenses.—A witness is entitled under this rule only to travelling expenses and other expenses of a similar nature, but he is not entitled to compensation for loss of time (m).

3. The sum so paid into Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

Tender of expenses to witness.

4. (1) Where it appears to the Court or to such officer as it appoints in this behalf that the sum paid into Court is not sufficient to cover such expenses or reasonable remuneration, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and,

Procedure when insufficient sum paid in

(k) *Bhagat v. Debi* (1894) 10 All. 218; *Kajur Ahmad v. Kajur Muhammad* (1885) 9 Bom. 308

(l) *Veerabadrán v. Nataraja* (1904) 28 Mad. 28.
(m) *Narain v. Pichonmuraiah* (1865) 2 Hyd. 230.

O. 16, in case of default in payment, may order such sum to be
rr. 4-6. levied by attachment and sale of the moveable property of
the party obtaining the summons; or the Court may discharge
the person summoned without requiring him to give
evidence; or may both order such levy and discharge such
person as aforesaid.

(2) Where it is necessary to detain the person summoned
for a longer period than one day, the
Expenses of witness
detained more than one
day. Court may, from time to time, order the
party at whose instance he was summoned
to pay into Court such sum as is sufficient to defray the expenses
of his detention for such further period, and, in default of such
deposit being made, may order such sum to be levied by attach-
ment and sale of the moveable property of such party; or the
Court may discharge the person summoned without requiring
him to give evidence; or may both order such levy and dis-
charge such person as aforesaid.

5. Every summons for the attendance of a person to
give evidence or to produce a document
Time, place and purpose
of attendance to be specified
in summons. shall specify the time and place at which
he is required to attend, and also whether
his attendance is required for the purpose of giving evidence
or to produce a document, or for both purposes; and any
particular document, which the person summoned is called
on to produce, shall be described in the summons with reason-
able accuracy.

Where hearing is postponed.—When a witness attends Court in pursuance
of a summons on the day specified in the summons, but the case is not reached on that
day, it is not necessary to issue a fresh summons. He need only be warned that his
attendance will be required on the day to which the hearing may be postponed (n).

6. Any person may be summoned to produce a docu-
ment, without being summoned to give
Summons to produce doc-
ument. evidence; and any person summoned merely
to produce a document shall be deemed to
have complied with the summons if he causes such document
to be produced instead of attending personally to produce
the same.

(n) *Subbarayudu v. Chenchuramayya* (1901) 21 Mad. 200.

7. Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power.

Power to require persons present in Court to give evidence or produce document

O. 16,
rr. 7-10.

8. Every summons under this Order shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in Order V as to proof of service shall apply in the case of all summonses served under this rule

Summons how served

9. Service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required.

Time for serving summons

10. (1) Where a person to whom a summons has been issued either to attend to give evidence or to produce a document fails to attend or to produce the document in compliance with such summons, the Court shall, if the certificate of the serving-officer has not been verified by affidavit, and may, if it has been so verified, examine the serving-officer on oath, or cause him to be so examined by another Court, touching the service or non-service of the summons.

Procedure where witness fails to comply with summons.

(2) Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding

O. 16. the amount of the costs of attachment and of any fine which
rr. 10-13. may be imposed under rule 12 :

Provided that no Court of Small Causes shall make an order for the attachment of immoveable property.

11. Where, at any time after the attachment of his property, such person appears and satisfies the Court.—
If witness appears, attachment may be withdrawn.

(a) that he did not, without lawful excuse, fail to comply with the summons or intentionally avoid service, and

(b) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule, that he had no notice of such proclamation in time to attend.

the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit.

✓**12.** The Court may, where such person does not appear or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition in life and all the circumstances of the case and may order his property, or any part thereof, to be attached and sold or, if already attached under rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any :
Procedure if witness fails to appear.

Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.

13. The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this Order as if the person whose property is so attached were a judgment-debtor.
Mode of attachment

14. Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary to examine any person other than a party to the suit and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

Court may of its own accord summon as witness stranger to suit.

O. 16,
rr. 14-18

15. Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place.

Duty of persons summoned to give evidence or produce document.

16. (1) A person so summoned and attending shall, unless the Court otherwise directs, attend at each hearing until the suit has been disposed of.

When they may depart

(2) On the application of either party and the payment through the Court of all necessary expenses (if any) the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained in the civil prison.

17. The provisions of rules 10 to 13 shall, so far as they are applicable, be deemed to apply to any person who having attended in compliance with a summons departs, without lawful excuse, in contravention of rule 16.

Application of rules 10 to 13.

18. Where any person arrested under a warrant is brought before the Court in custody and cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable

Procedure where witness apprehended cannot give evidence or produce document.

O. 16, r. 18-21. bail or other security for his appearance at such time and place as it thinks fit, and, on such bail or security being given, may release him, and, in default of his giving such bail or security, may order him to be detained in the civil prison.

No witness to be ordered to attend in person unless resident within certain limits.

19. No one shall be ordered to attend in person to give evidence unless he resides—

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court-house.

20. Where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

Consequence of refusal of party to give evidence when called on by Court.

21. Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable.

Rules as to witnesses to apply to parties summoned.

Duty of suitors to give evidence on their own behalf.—In *Lal Kunwar v. Chiranjil Lal* (a), their Lordships of the Privy Council severely condemned the practice followed in some parts of India of advocates committing to call their own client as a witness in the hope of forcing their opponents to call him as their witness in order that they themselves may have the opportunity of cross-examining their own client when called by the other side. Referring to this practice, their Lordships said: "It is a vicious practice, unworthy of a high-toned or respectable system of advocacy. It must embarrass and perplex judicial investigation, and, it is to be feared, too often enable fraud, falsehood, or chicanery to baffie justice."

(a) (1900) 32 All. 104, 103-109, 37 I. A., 1, 4-5.

ORDER XVII.

O. 17,
rr. 1-3.*Adjournments.*

1. (1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

Court may grant time and adjourn hearing.

(2) In every such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment :

Costs of adjournment

¶ Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.

2. Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

Procedure if parties fail to appear on day fixed.

Failure to appear at adjourned hearing.—Where a party fails to appear at an adjourned hearing, the Court may proceed under O. 9 which prescribes the procedure to be adopted if a party fails to appear at the first hearing [see O. 9, rr. 3, 4, 6, 8, 9 and 13]. But the Court is not bound to do so. It may make *such other orders* as it thinks fit. Therefore, it is competent to the Court to grant a further adjournment.

3. Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

Court may proceed notwithstanding either party fails to produce evidence, etc.

Scope of the rule.—The provisions of this rule do not apply unless—

(1) the hearing is adjourned *on the application of a party to the suit, as distinguished from an adjournment by the Court of its own motion (p)* ;

(p) *Pearee v. Shama Churn* (1872) 19 W. R. 35.

O. 17, r. 3. (2) the adjournment is granted to enable the party to produce his evidence or to cause the attendance of his witnesses or to perform any other act necessary to the further progress of the suit; and

(3) the party fails to perform any of the acts for which the adjournment was granted within the time allowed by the Court.

Illustration.

A sues *B* to recover possession of certain lands. *B* contends that the suit is not properly valued. The Court thereupon appoints a commissioner, on the application of *A*, to value the land, and directs *A* to pay into Court Rs. 100, being the commissioner's fee, within a specified time. If *A* fails to make the payment within the prescribed time, the Court may proceed under this rule. The payment of the commissioner's fee is an "act necessary to the further progress of the suit" within the meaning of this rule: *Shaik Sahib v. Mahomed* (1890) 13 Mad. 510.

ORDER XVIII.

Hearing of the Suit and Examination of Witnesses.

**O. 18,
rr. 1, 2.**

1. The plaintiff has the right to begin, unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

"Unless the defendant admits the facts alleged by the plaintiff." - "Facts" mean "all material facts." Therefore where a defendant admits only some of the facts alleged by the plaintiff, it will not give him the right to begin (g).

Preliminary issue raised by defendant that suit does not lie.—Where the defendant raises a preliminary issue that the suit is barred as *res judicata*, the defendant has the right to begin (r).

2. (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.

(g) *Aghore v. Prem Chund* (1890) 7 C. L. R. 274. | (r) *Farmahar v. Aishabai* (1886) 12 Bom. 454.

(3) The party beginning may then reply generally on the whole case. O. 18,
rr. 2-5

"The other party shall then state his case".—Where there are two sets of defendants and their interests are practically the same, the rule is that after the plaintiff has closed his case, both the defendants should state their case before any evidence is given by either defendant (a).

Some of the defendants supporting plaintiff's case.—Where there are several defendants and some of them support the plaintiff's case, the rule of procedure is that the plaintiff and such of the defendants as support his case, wholly or in part, must address the Court and call their evidence in the first place, and then "the other party," namely, the persons opposed to the plaintiff's case and that of the other defendants supporting the plaintiff, must address the Court and call their evidence (b).

3. Where there are several issues the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

Evidence which is not
issues.

4. The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.

Witnesses to be examined
in open Court.

* 5. In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and the Judge shall, if necessary, correct the same, and shall sign it.

How evidence shall be
taken in appealable cases.

(a) *Re Dinksham* (1902) 29 Cal. 32.

(b) *Haji Bibi v. Sultan Mahomed Khan* (1908) 32 Bora. 599.

O. 18,
rr. 6-11.

6. Where the evidence is taken down in a language different from that in which it is given, and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it is given.

When deposition to be interpreted.

7. Evidence taken down under section 138 shall be in the form prescribed by rule 5 and shall be read over and signed and, as occasion may require, interpreted and corrected as if it were evidence taken down under that rule.

Evidence under section 138.

8. Where the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes and such memorandum shall be written and signed by the Judge and shall form part of the record.

Memorandum when evidence not taken down by Judge

9. Where English is not the language of the Court, but all the parties to the suit who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as is given in English taken down in English, the Judge may so take it down.

When evidence may be taken in English.

10. The Court may, of its own motion or on the application of any party or his pleader, take down any particular question and answer, or any objection to any question, if there appears to be any special reason for so doing.

Any particular question and answer may be taken down.

11. Where any question put to a witness is objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon.

Questions objected to and allowed by Court

12. The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination. O. 18,
rr. 12-16.

Remarks on demeanour of witnesses.

13. In cases in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

Memorandum of evidence in unappealable cases.

14. (1) Where the Judge is unable to make a memorandum as required by this Order, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court.

Judge unable to make such memorandum to record reasons of his inability.

(2) Every memorandum so made shall form part of the record.

15. (1) Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.

Power to deal with evidence taken before another Judge.

(2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 24.

16. (1) Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.

Power to examine witness immediately.

O. 18,
rr. 16-18.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same and shall sign it, and it may then be read at any hearing of the suit.

— 17. The Court may at any stage of a suit recall any witness who has been examined and may Court may recall and examine witness. (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit.

18. The Court may at any stage of a suit inspect any Power of Court to inspect. property or thing concerning which any question may arise.

ORDER XIX.

Affidavits.

O. 19,
rr. 1, 2.

1. Any Court may at any time for sufficient reason order that any particular fact or facts may be Power to order any point to be proved by affidavit proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable :

✱ Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

2. (1) Upon any application evidence may be given by affidavit, but the Court may, at the Power to order attendance of deponent for cross-examination. instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs O. 19,
rr. 2, 3.

3 (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted: provided that the grounds thereof are stated.

Matters to which affidavits shall be confined

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies or extracts from documents shall (unless the Court otherwise directs) be paid by the party filing the same.

Grounds of belief.—The grounds of belief must be stated with sufficient particularity to enable the Court to judge whether it would be safe to act on the deponent's

ORDER XX.

Judgment and Decree.

Court, after the case has been heard, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders. O. 20,
rr. 1, 2.

pronounced

2. A Judge may pronounce a judgment written but not pronounced by his predecessor.

Predecessor.—It does not matter that the judgment was pronounced after he had taken leave or left the judicial post or heard the case (v)

word "may" leaves a Judge the option to pronounce in view of the case, though it may be different from the case in which the predecessor who heard the case (w)

<p>1911 259 1917 34 Cal Kastur a Shanley</p>	<p>v Gopalan (1905) 7 Bom L R 951 (w) Lachman Prasad v Ram Kishan (1910) 33 All. 236</p>
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O. 20,
rr. 3-6.

3. The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed shall not afterwards be altered or added to, save as provided by section 152 or on review.

Judgment to be signed.

"**Shall not afterwards be altered.**"—Where a District Judge delivered a judgment in open Court, but suspended the issue of the decree pending the production by the plaintiff of a certificate of succession, it was held that it was not competent to the Judge to cancel the judgment and deliver another judgment inconsistent with the first (x).

4. (1) Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon.

Judgments of Small Cause Courts.

(2) Judgments of other Courts shall contain a statement of the case, the points for determination, the decision thereon and the reasons for such decision.

Judgments of other Courts.

Court invested with Small Cause Court powers.—A Court with Small Cause Court powers is governed by sub-r. (1) and not sub-r. (2).

5. In suits in which issues have been framed, the Court shall state its finding on each issue, shall state its finding or decision and the reasons therefor, upon each issue, unless the finding upon any one of the issues is sufficient for the decision of the suit.

Court to state its decision on each issue.

Object of Judgment.—The proper object of a judgment is to state the most cogent reasons that suggest themselves the final conclusion which the Judge has conscientiously arrived at. That object is defeated by the Judge allowing the fluctuations of his mind from day to day in reference to the facts and the arguments. It is a substantial objection to a judgment that it does not answer the question as it was presented by the parties, e.g., whether a document is to be a forgery which both sides admit to be genuine (y).

6. (1) The decree shall agree with the findings of the Court and shall contain the number, names and descriptions of the particulars of the claim, and shall specify the relief granted or other determination of the suit.

Contents of decree.

(x) *Kishan Kunwar v. Ganga Prasad* (1900) 31 All. 153.
(y) *Narayan v. Bhagu* (1907) 31 Bom. 314.

(2) *Sri Lingam v. S. L. A.*

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid. O. 20.
rr. 6-11.

(3) The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter.

7. The decree shall bear date the day on which the judgment was pronounced, and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.

Date of decree.

8. Where a Judge has vacated office after pronouncing judgment but without signing the decree, a decree drawn up in accordance with such judgment may be signed by his successor or, if the Court has ceased to exist, by the Judge of any Court to which such Court was subordinate.

Procedure where Judge has vacated office before signing decree.

9. Where the subject-matter of the suit is immoveable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by boundaries or by numbers in a record of settlement of survey, the decree shall specify such boundaries or numbers.

Decree for recovery of immoveable property.

10. Where the suit is for moveable property, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had.

Decree for delivery of moveable property.

11. (1) Where, and in so far as a decree is for the payment of money, the Court may, for any sufficient reason at the time of passing the decree, order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

Decree may direct payment by instalments.

O. 20,
rr. 11, 12.

(2) After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit.

“In so far as the decree is for the payment of money.”—This rule applies to money decrees only and not to mortgage decrees (a). As to mortgage decrees, see O. 34.

12. (1) Where a suit is for the recovery of possession of immoveable property and for rent or mesne profits, the Court may pass a decree—

Decree for possession and
mesne profits.

- (a) for the possession of the property ;
- (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits ;
- (c) directing an inquiry as to rent or mesne profits from the institution of the suit until—
 - (i) the delivery of possession to the decree-holder,
 - (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or
 - (iii) the expiration of three years from the date of the decree,

whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c) a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.

Decree for possession and mesne profits.—Under the Code of 1882, the amount of mesne profits was to be determined in *execution proceedings*. Under the present rule, the amount must be determined *by the decree*, and not in execution.

(a) *Shankarappa v. Danappa* (1881) 5 Bom. 604.

In a suit for the recovery of possession of immoveable property, the plaintiff may claim mesne profits which have accrued due during a period *prior to the institution of the suit*. He may also claim mesne profits which have accrued due *subsequent to the institution of the suit*. The decree to be passed in such a case will now be as follows :—

1. That the defendant do put the plaintiff in *possession* of the property specified in the schedule annexed to the decree. [To this extent the decree is *final*.]
2. { That the defendant do pay to the plaintiff the sum of Rs. with interest thereon at the rate of per cent. per annum to the date of realization on account of mesne profits which have accrued due *prior to the institution of the suit*. [To this extent the decree is *final*.]
Or (where accounts have to be taken of the mesne profits)
That an inquiry be made as to the amount of mesne profits which have accrued due *prior to the institution of the suit*. [To this extent the decree is *preliminary* : see s. 2, Expln.]
3. That an inquiry be made as to the amount of mesne profits *from the institution of the suit* until [the point of time specified in cl. (c) of the section] [To this extent the decree is *preliminary*].

The inquiry referred to above will be held before an officer of the Court appointed in that behalf, who must report to the Court the result of the inquiry. After that is done, and the parties have been heard on the report, a *final* decree will be passed in respect of the mesne profits.

Mesne Profits.—The expression “mesne profits” is defined in s. 2, cl. (12), as meaning those profits which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession.

The claim for mesne profits is virtually a claim for damages. Hence there is no rigid rule for determining the amount of mesne profits, and the amount must be assessed in every case by a proper exercise of judicial discretion (*b*). “Mesne profits are in the nature of damages which the Court may mould according to the justice of the case.” Hence in calculating mesne profits, payments of revenue and cesses made by the defendant should be deducted (*c*). But the costs of collecting the rents or profits should not be allowed to the defendant, unless he entered on the property in the exercise of a *bond fide* claim of right (*d*). Where a defendant who has been in wrongful possession *abandons* the land without giving notice to the plaintiff, he will be held liable for mesne profits (*e*).

Where a person buys immoveable property from a defendant pending a suit against him for recovery of the property and for mesne profits, and a decree is eventually passed against the defendant, the plaintiff is entitled to recover the mesne profits not only from the defendant, but from the purchaser *pendente lite* (*f*).

Interest forming part of mesne profits.—It will be seen from the definition of mesne profits, that mesne profits consist of *two* items, namely, (1) profits of the property, and (2) interest on such profits. Hence if a decree awards mesne profits, but

(b) *Grish Chunder v. Shoshi* (1900) 27 Cal. 951, 27 I. A. 110.

(c) *Dakhina v. Saroda* (1894) 21 Cal. 142, 20 I. A. 180.

(d) *Dungar v. Jai Ram* (1902) 24 All. 376

(e) *Kishnanand v. Pratab Narain* (1884) 10 Cal. 785, 11 I. A. 88.

(f) *Midnapore Zemindari Co., Ltd. v. Naresb Narain* (1911) 39 Cal. 220.

O. 20, says nothing about interest, that is, interest on profits, it must be construed as including rr. 12, 13. not only the profits, but the interest on such profits. It has been so held by their lordships of the Privy Council in *Grish Chunder v. Shoshi Shikharaswar* (g).

"Three years from the date of the decree."—"Decree" means final decree. Thus if an appeal is preferred from a decree for mesne profits, and the decree is confirmed in appeal, the period of three years is to be computed from the date of the appellate decree (h). Similarly, if a decree for mesne profits is taken to the Privy Council in appeal and is confirmed, the period of three years is to be counted from the date of the King's order in Council (i).

13. (1) Where a suit is for an account of any property and for its due administration under the decree of the Court, the Court shall, before passing the final decree, pass a preliminary decree ordering such accounts and inquiries to be taken and made, and giving such other directions as it thinks fit.

(2) In the administration by the Court of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being within the local limits of the Court in which the administration-suit is pending with respect to the estates of persons adjudged or declared insolvent; and all persons, who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree, and make such claims against the same as they may respectively be entitled to by virtue of this Code.

Administration-suit.—Where a person dies leaving a will, it is his executor that administers his estate, and where he dies intestate, it is his administrator that administers his estate. The administration of the estate of a deceased person consists, first, in paying his funeral expenses, next his debts, and then the legacies under his will (if any). The residue of his estate is then to be divided amongst the *residuary legatees* under his will (j), or among his heirs if he has left no will. In an administration-suit, it is the Court that takes upon itself to a large extent the functions of an executor or administrator, and administers the estate of the deceased.

(g) (1900) 27 Cal. 651, 697, 27 I. A. 110.

(h) *Radha Nath v. Chandī Charan* (1903) 30 Cal. 660.

(i) *Bhup Indor v. Bijai* (1901) 23 All. 152, 27

I. A. 209.

(j) Indian Succession Act, 1885, ss. 279-285, Probate and Administration Act, 1881 ss. 101-106.

The following persons may maintain an administration-suit :—

O. 20,
rr. 13, 14.

(1) A creditor of the deceased, whose claim is not paid off by the legal representatives of the deceased. But though a creditor may bring an administration-suit, he must bring the suit on behalf of *himself and the other creditors (b)*.

(2) A legatee, whether specific or pecuniary, where the legacy is not paid to him by the legal representatives of the deceased.

(3) Next-of kin of the deceased, for their share in the estate of the deceased.

(4) An executor or administrator, when there are disputes amongst the legatees or next-of kin as to the amount of the property left by the deceased and the amount to which the legatees or next-of kin are entitled.

Suit to recover assets improperly paid by the Administrator-General.

—This section does not apply to a suit brought by a creditor of the deceased against the Administrator-General (to whom letters of administration have been granted) and against other creditors of the deceased to recover assets alleged to have been improperly paid by the Administrator-General to such creditors in priority to the plaintiff (1).

✓ 14. (1) Where the Court decrees a claim to pre-emption
Decree in pre-emption
suit. in respect of a particular sale of property
and the purchase-money has not been paid
into Court, the decree shall—

(a) specify a day on or before which the purchase-money shall be so paid, and

(b) direct that on payment into Court of such purchase-money, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

(2) Where the Court has adjudicated upon rival claims to pre-emption, the decree shall direct,—

(a) if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre-emptor failing to comply

(1) *Worralter v. Fryer* (1878) 2 C. D. 109.

(b) *Navajee v. Adm.-Gen. of Madras* (1913) 38 Mad 500.

O. 20,
rr. 14-16.

with the said provisions would, but for such default, have taken effect ; and,

- (b) if and in so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.

Pre-emption.—The right of pre-emption can only be exercised in respect of *immoveable property*. *A* and *B*, both Mahomedans, are *co-sharers* of a house. If *B* sells his share to *X* for Rs. 500, *A* is entitled to pre-empt *B*'s share on payment of Rs. 500, that is to say, *A* as co-sharer may require *B* to sell his share to him *in preference* to *X*. The same rule applies if *A* and *B* are owners of *adjoining* houses. If *B* refuses to sell his share to *A*, *A* may institute a suit for pre-emption against *B* and *X*. It has been held by the High Court of Allahabad, that if the sale by *B* to *X* has been completed before the date of the suit, *B* having no longer any interest in the property, he is not a necessary party to the suit (*m*). If a decree is passed for *A*, and if he has not paid the amount of purchase-money into Court, the decree should specify a day on or before which the purchase-money should be paid into Court. If the amount is paid within the time fixed by the Court, *A* will be entitled to enter into possession of *B*'s share. But if he fails to pay the amount within that time, he will lose the benefit of the decree (*n*). The Original Court has no power to extend the time for payment (*o*), but the Appellate Court may extend the time for making the payment (*p*).

15. Where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit.

Decree in suit for dissolution of partnership.

Preliminary decree directing accounts to be taken.—The preliminary decree directing accounts to be taken should always contain a declaration of the rights of the parties. After the accounts are taken, a final decree is passed directing that the partnership assets be applied, first, in payment of the partnership debts, next, in payment of the costs of the suit, and lastly, in payment to each partner of the amount found due to him on the taking of the accounts.

16. In a suit for an account of pecuniary transactions between a principal and an agent, and in any other suit not hereinbefore provided for, where it is necessary, in order to

Decree in suit for account between principal and agent.

(*m*) *Ram Sarup v. Sital* (1904) 26 All. 549. (*o*) *Suranjan v. Ram Bahal* (1913) 35 All. 582.
(*n*) *Jat Kishn v. Bholu Nath* (1892) 14 All. 529; (*p*) *Parshadi v. Ram Dial* (1880) 2 All. 744; *Kodari Jaggur Nath v. Jokhu* (1899) 18 All. 223. *Singh v. Jasiri Singh* (1891) 13 All. 376.

ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit. O. 20,
rr. 16-19.

17. The Court may, either by the decree directing an account to be taken or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched and in particular may direct that in taking the account the books of account, in which the accounts in question have been kept, shall be taken as *prima facie* evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised.

18. Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,—

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54.

(2) if and in so far as such decree relates to any other immoveable property or to moveable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

19. (1) Where the defendant has been allowed a set-off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.

Decree when set-off is allowed.

O. 20,
rr. 19, 20.

(2) Any decree passed in a suit in which a set-off is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off had been claimed.

(3) The provisions of this rule shall apply whether the set-off is admissible under rule 6 of Order VIII or otherwise.

20. Certified copies of the judgment and decree shall be furnished to the parties on application to the Court, and at their expense.

Certified copies of judgment and decree to be furnished.

ORDER XXI.

Execution of Decrees and Orders.

Payment under decree.

O. 21, r. 1. Modes of paying money under decree.

1. (1) All money payable under a decree shall be paid as follows, namely :—

- (a) into the Court whose duty it is to execute the decree ;
- or
- (b) out of Court to the decree-holder ; or
- (c) otherwise as the Court which made the decree directs.

(2) Where any payment is made under clause (a) of sub-rule (1), notice of such payment shall be given to the decree-holder.

Of execution of decrees in general.—The present order is the longest Order in the whole Schedule. It consists of 103 rules. It is proposed here to give a general idea of proceedings in execution. The references to the rules given in the following notes are to the rules of the present Order.

A obtains a decree against *B* for Rs. 5,000. Here *A* is the decree-holder, *B* is the judgment-debtor, and Rs. 5,000 is the judgment-debt. If *B* fails to satisfy the decree, *A* may apply for execution of the decree against *B*'s person, or against his property, or both (r. 30). But the Court may, in its discretion, refuse execution *at the same time* against the person and property of the judgment-debtor (r. 21). Execution against the person of the judgment-debtor consists in arresting him and detaining him in jail.

Execution against the property of a judgment-debtor consists in attaching and selling his property, and paying the decree-holder the amount of the judgment-debt out of the sale-proceeds. **O. 21, r. 1**

Application for execution.—All proceedings in execution are to be commenced by an application for execution (r. 10). The application for execution must be in writing [r. 11 (2)] and should contain the particulars set forth in rr. 11 (2) to 14. The only exception is where the decree is for the payment of money and the judgment-debtor is in the precincts of the Court when the decree is passed, in which case the Court may order immediate execution on the *oral* application of the decree-holder at the time of passing the decree [r. 11 (1)]. If the application complies with the requirements of rr. 11 (2) to 14, the Court will direct execution to issue (r. 24). If it does not, the Court may reject it, or may require it to be amended (r. 17). If the application is rejected, the decree-holder may present another application properly framed.

Notice before ordering execution.—The law does not require any notice to be issued to the party against whom execution is applied for, except in the cases mentioned in r. 22 below. There is one case in which it is *discretionary* with the Court to issue a notice before making an order for execution, and that is where the decree is for *money* and execution is sought against the *person* of the judgment-debtor (r. 37).

Execution against person of judgment-debtor.—*A* obtains a decree against *B* for Rs. 5,000 and costs. [This is a money-decree.] *B* fails to pay the amount of the judgment-debt. *A* applies for execution of the decree against *B*'s *person* [r. 11 (2), cl. (j)]. The decree being a money-decree, the Court *may*, instead of issuing a warrant for *B*'s arrest, issue a notice calling upon him to appear and show cause why he should not be committed to the civil prison in execution of the decree (r. 37). If *B* appears and satisfies the Court that he is unable to pay the amount of the decree from poverty or other sufficient cause and, if there are no circumstances which would disentitle *B* to the indulgence of the Court, the Court may make an order disallowing *A*'s application for *B*'s arrest and detention (r. 40 (1)). If *B* does not appear, the Court should issue a warrant for his arrest if the decree-holder so requires (r. 37). If *B* appears, but fails to show cause to the satisfaction of the Court, the Court should cause him to be arrested [r. 40 (5)]. Where a warrant of arrest is issued, it should be executed by an officer of the Court appointed in that behalf (rr. 24-25). If, when the officer goes to execute the warrant *B* pays the amount of the judgment-debt which must always be specified in the warrant, the officer should receive the payment and the warrant should not then be executed (r. 38). But if no payment is made, *B* should be arrested and brought before the Court "as soon as practicable" (s. 55). If a notice was issued prior to his arrest under r. 37, the Court should forthwith make an order committing him to the civil prison [r. 40 (5)]. If no such notice was issued, it is open to *B* to show that he is unable to pay the amount of the decree from poverty or any other sufficient cause [r. 40 (1)]. If the Court is satisfied that *B* is unable to pay the amount of the decree from poverty or any other sufficient cause, and if there are no other circumstances which would disentitle *B* to the indulgence of the Court, the Court will make an order directing *B*'s release [r. 40 (1)]. Otherwise the Court will make an order committing *B* to prison [r. 40 (5)]. The prison is to be a civil prison (s. 55), and the term of detention in the prison is not to exceed six months in any case (s. 58). Note that no woman can be arrested in execution of a *money-decree* [s. 56].

O. 21, rr. 1, 2. **Execution against property of judgment-debtor.**—This subject may be considered under two heads, namely, (1) attachment, and (2) sale. We shall first state the rules relating to attachment, and then the rules governing sale.

I. Attachment.—Attachable property belonging to a judgment-debtor may be divided into two classes, (1) moveable, and (2) immoveable.

As to attachment of moveable property.—See rr. 43 to 53.

Attachment of immoveable property.—If the property be immoveable, the attachment is to be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and prohibiting all other persons from taking any benefit from such transfer or charge. The order is to be proclaimed at some place on or adjacent to the property, and a copy of the order is to be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house (r. 54). If during the pendency of the attachment the judgment-debtor satisfies the decree through the Court, the attachment will be deemed to be withdrawn (r. 55). Otherwise the Court will order the property to be sold (r. 64).

II. Sale of attached property.—If the property attached be moveable property which is subject to speedy and natural decay, the same may be sold at once (r. 43). As regards other property, whether it be moveable or immoveable, the first step to be taken by the Court towards the sale thereof is to cause a proclamation of the intended sale to be made, stating the time and place of sale, and specifying the property to be sold. the revenue (if any) assessed upon the property, the encumbrances (if any) to which it is liable, the amount for the recovery of which the sale is ordered, and such other particulars as the Court considers material for a purchaser to know in order to judge of the nature and value of the property (r. 66). No sale should take place until after the expiration of at least thirty days in the case of immoveable property, and of at least fifteen days in the case of moveable property, calculated from the date on which a copy of the proclamation has been affixed on the Court-house of the Judge ordering the sale, unless the judgment-debtor consents in writing to the sale being held at an earlier date (r. 68). After the property is sold, the sale must be confirmed by the Court. A certificate of sale is then issued to the purchaser. The sale-proceeds of property sold in execution of a decree are to be applied in the manner prescribed by s. 73.

Decree directing payment to decree-holder.—Payment into Court is a valid compliance with a decree even though the decree directs payment to the decree-holder (q).

2. (1) Where any money payable under a decree of any kind is paid out of Court or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree and the Court shall record the same accordingly.

(2) The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue

Payment out of Court to decree-holder.

a notice to the decree-holder to show cause, on a day to be fixed **O. 21, r. 2.** by the Court, why such payment or adjustment should not be recorded as certified; and if after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognised by any Court executing the decree.

Scope and application of the rule.—This rule provides that—

- (1) where any money payable under a decree of any kind is *paid out of Court*, or
- (2) where a decree is otherwise *adjusted* in whole or in part to the satisfaction of the decree-holder,

the decree-holder *shall* certify such payment or adjustment to the Court whose duty it is to execute the decree, so that the same may be recorded by that Court.

If the decree-holder fails to inform the Court of the payment or adjustment, *it is open* to the judgment-debtor to protect himself from execution of the decree by applying to the Court within 90 days from the date of the payment or adjustment (r) to issue a notice to the decree-holder to show cause why the payment or adjustment should not be recorded as certified. If the payment or adjustment is not certified by either party, it shall not be recognized by any Court executing the decree. This may be explained by the following

Illustration.

A obtains a decree against B for Rs. 2,000. It is subsequently agreed between A and B that A should accept Rs. 1,000, in full satisfaction of the decree. B accordingly pays A Rs. 1,000 but *neither the payment nor adjustment is certified to the Court*. A applies for execution of the full amount of the decree *notwithstanding* the adjustment. B objects to execution on the ground that the decree has been adjusted. The adjustment, not being certified, cannot be recognized by the Court *executing the decree*, and the Court must direct execution to issue. It will not avail B to contend that A had agreed to certify the payment to the Court, but had fraudulently omitted to do so (s).

Sub-rule (3).—Sub-rule (3) provides that an uncertified payment or adjustment shall not be recognized by any Court *executing the decree*. The words “Court executing the decree” indicate the extent to which an uncertified payment or adjustment should not be recognized by a Court. These words show that the prohibition to take cognizance of an uncertified payment or adjustment is limited to the Court which is called upon to *execute the decree*. It is in execution proceedings alone that an uncertified payment or adjustment cannot be recognized by a Court. The rule does not prohibit a Court from taking cognizance of such payment or adjustment in proceedings other than execution proceedings. An uncertified payment or adjustment may therefore be

(r) Limitation Act, 1908, Sch. I, art. 174.
(s) *Genapathy v. Chenna* (1906) 29 Mad. 312; *Veerappa v. Ponnappa* (1907) 17 Mad. L.

J. 527; *Trimbak v. Hari* (1910) 34 Bom. 575.

O. 21, r. 2. recognized by a Court *trying a suit* based upon such payment or adjustment (*l*). This gives rise to the following questions:—

1. Whether, on the Court directing execution to issue in the case put in the above illustration, *B* could maintain a *suit* against *A* for a declaration that the decree has been adjusted, and for an *injunction* restraining *A* from executing the decree?

2. Whether, if *A* causes the decree to be executed notwithstanding the adjustment, and *B*'s property is sold in execution, *B* could maintain a *suit* against *A* to set aside the sale, on the ground that the decree having been adjusted, *A* ought not to have caused the same to be executed?

3. Whether, if *A* causes the decree to be executed notwithstanding the adjustment, *B* could maintain a *suit* against *A* to recover damages for breach of the contract represented by the adjustment? In other words, whether, if *B* is compelled to pay in execution of the decree the full amount of the decree, namely, Rs. 2,000, he is entitled to recover back that sum from *A* as damages for breach of the contract on *A*'s part not to execute the decree?

Each of the suits referred to above would involve recognition of an *uncertified* adjustment, and *B*'s success in each of them would depend *inter alia* upon the recognition of such adjustment by the Court *trying the suit*. Now, it has been made sufficiently clear that the prohibition against the recognition of an *uncertified* adjustment is confined to Courts *executing decrees*, and does not extend to Courts *trying suits*. Hence a Court trying any of the above suits would not be precluded from recognizing the adjustment, though the adjustment has not been certified. It is not, however, to be supposed that this circumstance by itself is sufficient to entitle *B* to a decree in all the three suits, for in the first two cases there is an initial difficulty in *B*'s way. That difficulty is presented by the provisions of s. 47 by which it is enacted that all questions relating to the "execution discharge or satisfaction" of a decree should be determined by the Court executing the decree, and *not by a separate suit*. Noting these provisions, we proceed to answer the above questions in order.

As regards the first question, it is quite true that *B*'s suit being for an injunction restraining *A* from executing the decree, the Court trying the suit *would recognize* the adjustment though it might not have been certified. But the Court cannot try the suit at all, for such a suit is barred under s. 47, the principal question in the suit being whether *A* should be restrained from *executing* the decree. This being a question relating to "execution," it cannot be tried in a separate suit (*n*). Hence the answer to the first question is in the negative.

The answer to the second question is also in the negative, and for the same reasons. The suit being one to set aside the sale in execution, the principal question would be whether the *proceedings in execution* should be set aside and this question is also one relating to "execution", within the meaning of s. 47, and the suit would therefore be barred under that section (*v*). It is therefore immaterial whether the purchaser at the sale in execution is a stranger or the decree-holder himself. There are two cases both prior in date to the Allahabad decision cited above, in which the property was purchased by a *stranger*, and the suit was to set aside the sale on the ground that the decree had

(*l*), *Suamirao v. Kashinath* (1891) 15 Bom. 419; *Kalan v. Kamta* (1891) 13 All. 335; *Ganasham v. Kashiram* (1892) 16 Bom. 569; *Iwar Chandra v. Haris Chandra* (1898) 25 Cal. 718. (v) *Azizan v. Matuk Lal* (1894) 21 Cal. 437; *Bairaguru v. Bapanna* (1892) 15 Mad. 302; *Deno Bundhu v. Hari* (1904) 31 Cal. 480. (v) *Jaikaran v. Raghunath* (1896) 20 All. 254.

already been satisfied out of Court at the time the sale was held. In both these cases it was held that the person who bought the property having purchased it *bond fide* at an auction sale, the sale to him could not be set aside. But the question whether the suit was *barred* was not raised in either of these cases. According to the Allahabad decision cited above, the suit would be barred under s. 47 (*w*).

O. 21,
rr. 2-4.

The third question stands upon a different footing. The suit therein referred to is one for the recovery of *damages* for breach of the contract represented by the adjustment. The contract represented by the adjustment was to accept Rs. 1,000 in full satisfaction of the decree, and not to execute the decree for its full amount. If notwithstanding the payment to *A* of Rs. 1,000 in pursuance of the adjustment, *A* causes the decree to be executed, and *B* is compelled to pay the amount of the decree (that is, Rs. 2,000) in execution, *B* may sue *A* to recover back that amount as *damages* for breach of the contract not to execute the decree. Such a suit is not barred under s. 47, for the principal question in the suit is not one relating to *execution*, but to the contract, its breach, and the amount of damages suffered by *B* in consequence of the breach. The answer to the third question is therefore in the affirmative (*x*). The Court trying the suit will take cognizance of the adjustment, and will direct *A* by its decree to repay Rs. 2,000 as and by way of damages to *B*, though the adjustment has not been certified.

The reader is now in a position to understand the following proposition which summarizes in one sentence all that has gone before:—

An uncertified payment or adjustment may be recognized by a Court *except when executing the decree*, and a suit based upon such payment or adjustment is maintainable *unless it is barred by the provisions of s. 47*.

Courts executing Decrees.

3. Where immoveable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure.

Lands situate in more than one jurisdiction.

4. Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes, and the Court which passed it wishes it to be executed in Calcutta, Madras, Bombay or Rangoon, such Court may send

Transfer to Court of Small Causes.

(w) *Yellapa v. Ramchandra* (1897) 21 Bom. 463 ;
Mathura Mohun v. Akhoy Kumar (1888)
16 Cal. 657.
(x) *Hanmant v. Subbabbai* (1896) 23 Bom. 394 ;
Periatambi v. Vellaya (1898) 21 Mad. 409 ;

Krishnasami v. Ranga (1897) 20 Mad.
369 ; *Paromanand v. Khepoo* (1884) 10
Cal. 354 ; *Gendo v. Nihal Kunwar* (1908) 30
All. 404.

O. 21,
rr. 4-7. to the Court of Small Causes in Calcutta, Madras, Bombay or Rangoon, as the case may be, the copies and certificates mentioned in rule 6; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

5. Where the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But, where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed.

Procedure where Court desires that its own decree shall be executed by another Court.

6. The Court sending a decree for execution shall send—

- (a) a copy of the decree;
- (b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied; and
- (c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.

7. The Court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the Court, for any special reasons to be recorded under the hand of the Judge, requires such proof.

Court receiving copies of decree, etc., to file same without proof.

Proof of jurisdiction.—A decree is sent for execution by Court X to Court Y. The judgment-debtor raises an objection in Court Y that Court X had no jurisdiction to pass the decree. Y has no power to enquire whether X had or had not jurisdiction to pass the decree (y).

8. Where such copies are so filed, the decree or order may, if the Court to which it is sent is the District Court, be executed by such Court or be transferred for execution to any subordinate Court of competent jurisdiction.

Execution of decree or order by Court to which it is sent.

C. 21,
rr. 8-11.

9. Where the Court to which the decree is sent for execution is a High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction.

Execution by High Court of decree transferred by other Court.

Application for Execution.

10. When the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof.

Application for execution.

11. (1) Where a decree is for the payment of money the Court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court.

Oral application.

(2) Save as otherwise provided by sub-rule (1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely ;—

Written application.

(a) the number of the suit ;

(b) the names of the parties ;

(c) the date of the decree ;

(d) whether any appeal has been preferred from the decree ;

O. 21,
rr. 11, 12.

- (e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree ;
- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results ;
- (g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed ;
- (h) the amount of the costs (if any) awarded .
- (i) the name of the person against whom execution of the decree is sought ; and
- (j) the mode in which the assistance of the Court is required, whether—
 - (i) by the delivery of any property specifically decreed ;
 - (ii) by the attachment and sale, or by the sale without attachment, of any property ;
 - (iii) by the arrest and detention in prison of any person ;
 - (iv) by the appointment of a receiver ;
 - (v) otherwise, as the nature of the relief granted may require.
- (3) The Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree.

12. Where an application is made for the attachment of any moveable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the

Application for attachment of moveable property not in judgment-debtor's possession.

application an inventory of the property to be attached, containing a reasonably accurate description of the same. O. 21,
rr. 12-15.

13. Where an application is made for the attachment of any immoveable property belonging to a judgment-debtor, it shall contain at the foot—

Application for attachment of immoveable property to contain certain particulars.

(a) a description of such property sufficient to identify the same and in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers ; and

(b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same.

14. Where an application is made for the attachment of any land which is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land, or its revenue, or as liable, to pay revenue for the land. and the shares of the registered proprietors.

Power to require certified extract from Collector's register in certain cases.

15. (1) Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

Application for execution by joint decree holder.

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

O. 21, rr. 15, 16. **What is a joint decree.**—A decree jointly passed in favour of more persons than one is a joint decree. *A* and *B* obtain a decree against *C* for Rs. 5,000: this is a joint decree. It is not the less a joint decree, because the shares of *A* and *B* in the decretal amount have been determined by the decree. Thus, if it is determined by the decree that the share of *A* is Rs. 2,000, and the share of *B* is Rs. 3,000, the decree is still a joint decree. But though the decree in such a case is a joint decree, the interest of *A* and *B* being determined by the decree, either of them may apply for execution to the extent of his interest (z). See para. 3 of the notes.

Application by one of several decree-holders for execution of the whole decree.—Ordinarily all the decree-holders in a joint decree must join in an application for execution of the decree. The present rule provides for the case in which all decree-holders are unable or are unwilling to join in the application, and in such case enables one or more of such decree-holders to apply for execution of the whole decree "for the benefit of them all." Where an application is made under this rule by some only of several joint decree-holders, the Court may, in its discretion, grant or refuse the application (a). Similarly, it is in the discretion of the Court whether or not to give notice to the other decree-holders or to the judgment-debtor before making an order for execution under this rule: it is not obligatory upon the Court to do so (b). If the application is allowed, the Court will under sub-r. (2) make such order as it deems necessary for protecting the interests of the other decree-holders and of the judgment-debtor (c).

Application by one of several decree-holders for execution in respect of his share of the decree.—The application under this rule by one of several holders of a joint decree must be for the execution of the whole decree and, further, it must be for the benefit of himself and the other decree-holders. A joint decree cannot be executed by one of several joint holders in respect of what the applicant considers his share in the decree (d). Thus, if a decree is passed for *A* and *B* for Rs. 5,000, the decree is joint, and neither *A* nor *B* can apply for execution of his proportionate share of the decree. But one of several holders of a joint decree may apply for execution of the decree to the extent of his interest therein, if the extent of such interest is determined by the decree. Thus, if in a suit for possession of land by *A* and *B* against *C*, the Court has declared each of the plaintiffs to be entitled to a moiety of the land, the Court may allow either plaintiff to execute the decree to the extent of his one half share, though the decree is a joint decree (e). See para. 1 of the notes.

16. Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to

Application for execution
by transferee of decree.

(z) *Hurriah Chunder v. Kali Sunderi* (1883) 9 Cal. 482, 10 I. A. 4. (d) *Collector of Shahjahanpur v. Surjan* (1882) 4 All. 72; *Dalchand v. Bai Shikar* (1891) 15 Bom. 242; *Muthusami v. Natesu* (1895) 18 Mad. 404.
(a) *Sheik Ahmed v. Shahzada* (1880) 7 C. L. R. 537. (e) *Hurriah Chunder v. Kallianaheri* (1887) 9 Cal. 482, 10 I. A. 4.
(b) *Durga Das v. Devaraj* (1906) 33 Cal. 306.
(c) *Tarasundari v. Beharidai* (1898) 1 B. L. R. A. C.

the same conditions as if the application were made by such O. 21,r.16. decree-holder :

Provided that, where the decree, or such interest as afore-said, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution :

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others.

Application for execution by transferee of decree.—No order should be made under this rule for the execution of a decree on the application of a transferee of the decree unless—

- (a) the decree has been transferred by assignment *in writing* or by operation of law ;
- (b) the application for execution is made to the Court which *passed the decree* ; and
- (c) where the decree has been transferred by assignment, *notice* of the application has been given to the transferor and the judgment-debtor.

Who may apply for execution under this rule.—The following persons, and no others, may apply for execution under this rule—

- (a) The transferee of a decree under an assignment *in writing*. [A transferee under an oral assignment has no *locus standi* to apply for execution under this rule (f)].
- (b) The transferee of a decree *by operation of law*, e.g., the legal representative of a deceased decree-holder, or the Official Assignee in the case of an insolvent decree-holder, or the purchaser of a decree at a Court-sale in execution of a decree against the decree-holder (r. 53) (g).
- (c) A transferee under an assignment *in writing* or by operation of law from the transferee mentioned in cls. (a) and (b), whether by immediate or mesne assignment (h).

Explanation.—The expression “transferee” in cls. (a), (b) and (c), is not confined to a transferee of the whole decree but includes a transferee of a *portion* of the decree (i) or, where the decree is a joint one, the transferee of the *interest* of any decree-holder in the decree (j).

Illustrations of the Explanation.

1. A, who holds a decree against B for Rs. 5,000, transfers his interest in the decree to the extent of Rs. 2,000 to X. The application for execution may be made by X and

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| <p>(f) <i>Parvata v. Digambar</i> (1891) 15 Bom. 307.
 (g) See <i>Gour Sunder v. Hem Chunder</i> (1889) 16 Cal. 355.
 (h) See <i>Amar Chandra v. Guru Prosunno</i> (1900) 27 Cal. 488; <i>Ganga v. Yakub</i> (1900) 27 Cal. 670.</p> | <p>(i) <i>Kishore v. Gisborne and Co.</i> (1891) 17 Ca. 143¹
 <i>Endoori v. Venkatachianulu</i> (1909) 33 Mad. 80.
 (j) <i>Muthunarayana v. Balakrishna</i> (1896) 19 Mad. 306.</p> |
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O. 21, r. 16. *assignee of a portion of the decree*, or it may be made by *A*, the decree-holder, or by *A* and *X* both together. In any case the application must be for execution of the *whole* decree: *Kishore v. Gishore & Coy.* (1890) 17 Cal. 341; *Gyanonee v. Radha* (1880) 5 Cal. 592, and not merely for the portion transferred: *Ramchandra v. Abdul* (1913) 35 All. 204.

2. *A* and *B* obtain a decree against *C* for Rs. 5,000. *A* assigns his interest in the decree to *X*. Here *X* occupies the double character of a *transferee* within the meaning of this rule and of a transferee of an interest in a *joint decree* within the meaning of r. 15. Hence any application that *X* may make for execution will be governed by the provisions both of this and the preceding rule: *Dwar Bulsh v. Fatik* (1899) 26 Cal. 250.

Transfer of decree for payment of money against two or more persons to one of them.—This subject may be considered under the following two heads:—

1. Where the whole decree has been transferred.
2. Where the decree is a joint one, and an interest only in such decree has been transferred.

First as regards transfer of the whole decree.—Where a decree for the payment of money has been transferred by assignment or by operation of law to one of several judgment-debtors, the decree is wholly extinguished. Hence the transferee cannot execute the decree against the other judgment-debtors, but his remedy against them is by a regular suit for contribution, as if the decree had been satisfied by him. The object of the second proviso to the rule is not to deprive the transferee of a decree, who might happen to be one of the judgment-debtors, of all relief, but to inject upon him the duty of proceeding by what was considered a more appropriate procedure, that is, a suit for contribution (*k*).

Illustrations.

(a) *A* obtains a decree against *B* and *C* for Rs. 5,000. *B* satisfies the decree by paying Rs. 5,000 to *A*. In such a case *C* is bound to pay to *B* his (*C*'s) share of the judgment-debt. If *C* fails to contribute his share, *B*'s remedy is by way of suit against *C* to recover the amount. [This illustration is merely introductory.]

(b) *A* obtains a decree against *B* and *C* for Rs. 5,000. *B* purchases the decree from *A*. Here *B*'s position is exactly the same as in ill. (a); that is to say, the decree must be taken as having been satisfied by *B*. *B* cannot therefore execute the decree against *C*, and his only remedy is to bring a suit against *C* for contribution: *Sreenath Doss v. Juggadanund* (1866) 9 W. R. 230.

(c) *A* obtains a decree against *B* and *C* for Rs. 5,000. *A* dies, and on his death the decree passes to *B* as his heir. The position is the same as in ill. (b): *Banarsi v. Mahurani* (1883) 5 All. 27.

Next, as regards transfer of an interest in a joint decree.—Where a decree has been passed jointly in favour of two or more persons, and the interest of any decree-holder in such decree has been transferred by assignment or by operation of law to one of several judgment-debtors, the decree is extinguished to the extent of the interest so transferred, and execution can only issue for the rest of the decree.

(l) *Anant v. Nagappa* (1908) 32 Bom. 195, 197.

Illustration.

A and B obtain a decree against C and D for Rs. 5,000. A's share of the decree is Rs. 2,000. A dies and on his death his interest in the decree passes to C as his heir. The decree is extinguished to the extent of Rs. 2,000, and neither B (as decree-holder) nor C (as transferee of A's interest in the decree) can execute the decree against D for more than Rs. 3,000; Pogose v. Fukurooddien (1876) 25 W. R. 343; Banarsi v. Maharane (1883) 5 All. 27. The same principle has been held to apply to mortgage-decree Kudhai v. Shro Dayal (1888) 10 All. 570

O. 21,
rr. 16-18.

17. (1) On receiving an application for the execution of a decree as provided by rule 11, sub-rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.

Procedure on receiving application for execution of decree.

(2) Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.

(3) Every amendment made under this rule shall be signed or initialled by the Judge.

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application :

Provided that in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.

18. (1) Where applications are made to a Court for the execution of cross-decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such Court, then—

Execution in case of cross-decrees.

(a) if the two sums are equal, satisfaction shall be entered upon both decrees; and

O. 21, r. 18.

(b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.

(2) This rule shall be deemed to apply where either party is an assignee of one of the decrees and as well in respect of judgment-debts due by the original assignor as in respect of judgment debts due by the assignee himself.

(3) This rule shall not be deemed to apply unless-

(a) the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits ; and

(b) the sums due under the decrees are definite.

(4) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons.

Illustrations.

(a) *A* holds a decree against *B* for Rs. 1,000. *B* holds a decree against *A* for the payment of Rs. 1,000 in case *A* fails to deliver certain goods at a future day. *B* cannot treat his decree as a cross-decree under this rule.

(b) *A* and *B*, co-plaintiffs, obtain a decree for Rs. 1,000 against *C*, and *C* obtains a decree for Rs. 1,000 against *B*, *C* cannot treat his decree as a cross-decree under this rule.

(c) *A* obtains a decree against *B* for Rs. 1,000. *C*, who is a trustee for *B*, obtains a decree on behalf of *B* against *A* for Rs. 1,000. *B* cannot treat *C*'s decree as a cross-decree under this rule.

(d) *A*, *B*, *C*, *D*, and *E* are jointly and severally liable for Rs. 1,000 under a decree obtained by *F*. *A* obtains a decree for Rs. 100 against *F* singly and applies for execution to the Court in which the joint-decree is being executed. *F* may treat his joint-decree as a cross-decree under this rule.

Application of the rule.—The meaning of sub-rule (1) may be explained by the following illustration : *A* holds a decree against *B* for Rs. 5,000. *B* holds a decree against *A* for Rs. 3,000. *A* and *B* each applies for execution of his decree to Court *X*

which has jurisdiction to execute both decrees. The decrees being cross-decrees they will be set off against each other. Hence *B*, who is the holder of the decree for the smaller amount, will not be allowed to take out execution of his decree. Execution will only be allowed of *A*'s decree to the extent of Rs. 2,000, being the difference between the amount of his and *B*'s decree. If in the case put above, the decree held by *B* was also for Rs. 5,000, neither party should be allowed to take out execution, and satisfaction should be entered upon both decrees. O. 21,
rr. 18-22.

19. Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other then,—

Execution in case of cross-claims under same decree.

- (a) if the two sums are equal, satisfaction for both shall be entered upon the decree; and.
- (b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree.

Object of the rule.—The object of this rule is to prevent each side executing a decree in respect of sums due, whether for costs or otherwise, under the *same decree* (l). *A* sues *B* for partition. A decree is passed in the suit as a result of which *A* becomes entitled to recover from *B*, Rs. 445 for mesne profits, and *B* becomes entitled to recover from *A* Rs. 855 for costs. Here *B* alone is entitled to take out execution, and that too for Rs. 855 — Rs. 445 = Rs. 410. *A* is not entitled to take out execution against *B*, even if *B*'s right to apply for execution is barred by limitation (m).

20. The provisions contained in rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge.

Cross-decrees and cross-claims in mortgage suits.

Object of the rule.—This rule is new. It is inserted in order to make it clear that the provisions as to cross-decrees and cross-claims apply to the case of mortgage-decrees. The rule also makes it clear that the expression “decree for the payment of money” and other similar expressions in the Code do not include a decree for sale in enforcement of a mortgage or charge. See in particular s. 34, s. 73, and O. 21, r. 53.

21. The Court may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor.

Simultaneous execution.

Notice to show cause against execution in certain cases.

✓ **22.** (1) Where an application for execution is made—

(l) *Bhagwan v. Ratan* (1894) 16 All. 395, at 397.

(m) *Madappa v. Jaki* (1916) 40 Bom. 60.

O. 21, r. 22.

- (a) more than one year after the date of the decree, or
- (b) against the legal representative of a party to the decree,

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him :

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

Consequence of omission to give notice.—This rule provides that, except where notice is dispensed with under sub-r. (2), the Court executing the decree *shall* issue a notice to the person against whom execution is applied for, where the application for execution is made more than one year after the date of the decree, or it is made against the legal representative of the judgment-debtor. This gives rise to the question whether the omission to give notice as required by this rule renders a sale absolutely *void for want of jurisdiction*, or whether the omission is a mere *irregularity*, in which case the sale is not void, but *voidable*, that is, valid until it is set aside. In *Gopal Chunder v. Gunumoni Dasi* (a), the High Court of Calcutta held that a notice under this rule is necessary in order that the Court should *obtain jurisdiction* to sell the property by way of execution, and that the omission to give the notice is by itself sufficient to render the sale void. This decision has since been approved by the Privy Council in *Raghubath Das v. Sundar Das* (b). Since the notice under this rule affords the very foundation of the jurisdiction, it follows that, where execution is issued without previously issuing a notice in a case where notice is required to be given under sub-r. (1) and property belonging to the judgment-debtor is sold in execution, the sale is a nullity, not only where the property is purchased by the decree-holder [O. 21,

(a) (1903) 20 Cal. 370.

(b) (1914) 41 I. A. 251, 42 Cal. 72: *Shyam v. |**Satinath* (1917) 41 Cal. 954.

r. 72] (p), but also where it is purchased by a third party (q). It does not make any difference whether the property sold is moveable or immoveable (r). **O. 21, rr. 22-24.**

Notice to wrong person.—The principle laid down above applies to cases where no notice as required by this rule is given at all. We now turn to cases where a notice is served, but, as it turns out subsequently, upon a *wrong person*. The leading case on the subject is *Malkarjun v. Narhari* (s). In that case a decree had been passed against a debtor, who afterwards died, and in executing the decree against his estate, a person was served as his legal representative with notice as required by this rule. The person served objected that he was not the legal representative of the deceased. The executing Court decided, and as it turned out subsequently, decided erroneously, that he was the legal representative [See s. 47]. After that the execution proceedings went on with the result that certain property belonging to the deceased judgment-debtor was sold and purchased by a third party. The question arose whether the sale was void as made without jurisdiction, or whether it was merely voidable. Their Lordships of the Privy Council held that a notice *having been served in fact*, though upon a wrong person, the Court *had* jurisdiction to sell the property, and the sale was not void. Their Lordships further held that the omission to give notice to the right person constituted a serious irregularity and that the sale was therefore voidable, that is to say, it was valid until it was set aside under O. 21, r. 90, or by independent suit brought within a year as provided by art. 12, cl. (a) of the Limitation Act. Their Lordships said: "He (the person served) contended that he was not the right person, but the Court, having received his protest, decided that he was the right person, and so proceeded with the execution. *In doing so the Court was exercising its jurisdiction. It made a sad mistake, it is true, but a Court has jurisdiction to decide wrong as well as right (t).*" See notes to s. 65, "sale when void and when voidable."

23. (1) Where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit.

24. (1) When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree.

(p) *Ramesuri Dass v. Doorga Dass* (1881) 6 Cal. 103. (r) *Sahdeo v. Ghuviram* (1894) 21 Cal. 19 [where the property sold was an elephant].
(q) *Imam-un-nissa v. Liakat Hussain* (1881) 3 All. 424. (s) (1901) 25 Bom. 337 27 I. A. 216.
(t) *Gopal Chunder v. Gunamoni Dasi* (1893) 20 Cal. 370; *Parashram v. Balmukund* (1908) 32 Bom. 672. (u) *Ib.*, p. 347. See also *Khizarjmal v. Daim* (1905) 32 Cal. 296, pp. 314, 315, 32 I. A. 23.

O. 21,
rr. 24-26. (2) Every such process shall bear date, the day on which it is issued, and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed.

(3) In every such process a day shall be specified on or before which it shall be executed.

25. (1) The officer entrusted with the execution of the process shall endorse thereon the day Endorsement on process on, and the manner in, which it was executed, and, if the latest day specified in the process for the return thereof has been exceeded, the reason of the delay, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court.

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability and shall record the result.

Stay of execution.

26. (1) The Court to which a decree has been sent for execution shall, upon sufficient cause When Court may stay execution being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application.

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor, the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.

Power to require security from, or impose conditions upon, judgment-debtor.

O. 21,
rr. 26-3

27. No order of restitution or discharge under rule 26 shall prevent the property or person of a judgment-debtor from being retaken in execution of the decree sent for execution.

Liability of judgment-debtor to discharge.

28. Any order of the Court by which the decree was passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution.

Order of Court which passed decree or of appellate Court to be binding upon Court applied to.

29. Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.

Stay of execution pending suit between decree-holder and judgment-debtor.

Mode of execution.

30. Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor or by the attachment and sale of his property, or by both.

Decree for payment of money.

31. (1) Where the decree is for any specific moveable, or for any share in a specific moveable, it may be executed by the seizure, if practicable, of the moveable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment-debtor, or by the attachment of his property or by both.

Decree for specific moveable property.

O. 21, rr. 31, 32. (2) Where any attachment under sub-rule (1) has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of moveable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.

32. (1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced by his detention in the civil prison, or by the attachment of his property, or by both.

Decree for specific performance, for restitution of conjugal rights, or for an injunction.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same, which he is bound to pay, or where, at the end of the one year from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease. O. 21,
rr. 32, 33.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

Illustration.

A, a person of little substance, erects a building which renders uninhabitable a family mansion belonging to *B*. *A* in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by *B* and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of *A*'s property would adequately compensate *B* for the depreciation in the value of his mansion. *B* may apply to the Court to remove the building and may recover the cost of such removal from *A* in the execution-proceedings.

33. (1) Notwithstanding anything in rule 32, the Court, either at the time of passing a decree for the restitution of conjugal rights or at any time afterwards, may order that the decree shall not be executed by detention in prison.

Discretion of Court in
executing decrees for res-
titution of conjugal rights.

(2) Where the Court has made an order under sub-rule (1), and the decree-holder is the wife, it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and if it thinks fit require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments.

(3) The Court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend

O. 21, the same as to the whole or any part of the money so ordered
 rr. 33, 34. to be paid, and again revive the same, either wholly or in part
 as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money.

34. (1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.

Decree for execution of document or endorsement of negotiable instrument.

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf.

(3) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time and the Court shall make such order approving or altering the draft as it thinks fit.

(4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force; and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered.

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely :—

“C. D., Judge of the Court of
 (or as the case may be), for A. B., in a suit by E. F. against A. B.”, and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.

(6) The Court, or such officer as it may appoint in this behalf, shall cause the document to be registered if its registration is required by the law for the time being in force or the decree-holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration. O. 21,
rr. 34, 35.

Sub-rule (6): registration. This sub-rule is new. It gives effect to a decision of the Allahabad High Court that where a document requires registration, it must be registered, though it may be executed by the Court (*a*). At the same time provision is made for the registration of documents, though their registration is optional, if the decree-holder desires to have them registered.

35. (1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.

Sub-rule (2).—This sub-rule is new. It has been inserted to remove the difficulty felt in executing decrees obtained by the owner of an undivided share in immovable property for joint possession as against his co-shares as also the difficulty felt in executing decrees obtained by a purchaser of the rights of a co-sharer for joint possession of the property with the other co-sharers.

Resistance to delivery of possession to decree-holder.—Where the holder of a decree for the possession of immovable property is resisted or obstructed by any person in obtaining possession of the property, the procedure to be followed is that prescribed by rr. 97-103 of this Order.

(a) *Kanahia Lal v. Kali Din* (1880) 2 All 392.

O.21, r.35. **Actual and formal possession.**—The delivery of possession directed to be given by sub-rules (1) and (3) contemplates the decree-holder being placed in *khas* or *actual* possession of the property, while that directed to be given by sub-rule (2) and by r. 36 contemplates the decree-holder being placed in *formal* or *symbolical* possession. *Formal* or *symbolical* possession is delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum or other customary mode, at some convenient place, the substance of the decree.

Rules 35 and 36 refer to cases where a suit is brought for possession of immoveable property, and a decree is passed in the suit for the delivery of the property to the decree-holder. Rules 95 and 96 refer to cases where immoveable property belonging to a judgment-debtor is sold in execution of the decree against him, and possession of the property is sought by the auction purchaser. In considering the distinction between actual and symbolical possession, it is desirable to consider both these sets of rules together, for they are both governed by the same principles. Where the immoveable property of which possession is directed by the decree to be delivered to the decree-holder is in the possession of the judgment-debtor, *actual possession* must be delivered to the decree-holder under r. 35 (1). Where it is in the possession of a tenant or other person entitled to occupy the same, *symbolical possession* only can be delivered, and that is to be done under r. 36. Likewise, where immoveable property is sold in execution of a decree, and possession is sought by the auction-purchaser, *actual possession* must be delivered to him under r. 95, if the property is in the possession of the judgment-debtor. But if the property is in the possession of a tenant or other person entitled to occupy the same *symbolical possession* only can be delivered, and that is to be done under r. 96.

It is clear from what is stated above that there are only three cases in which the law allows symbolical possession to be given, namely, the cases contemplated (1) by sub-rule (2) of the present rule, (2) by r. 36, and (3) by r. 96 of this Order. *Symbolical* possession given in such cases operates as *actual* possession against the judgment-debtor, but not against third persons who were not parties to the decree (v). In other words *symbolical* possession is no possession at all as against third parties. This distinction is of great importance in the law of limitation. This may be explained by the following

Illustration.

(1) *P* obtains a decree against *D*. In execution of the decree certain property alleged to belong to *D* is sold, and it is purchased by *A*. *A* applies for possession and he is placed in *symbolical* possession of the property. *C* has been in possession of the property adversely to *D* for 10 years prior to the date on which *A* is placed in symbolical possession. *C* continues to be in possession of the property as before. After three years *A* sues *C* for possession. The defence is that *C* has been in adverse possession for more than twelve years, and the suit is therefore barred under art. 144 of the Limitation Act. *A* contends that his symbolical possession operated to break the continuity of the adverse possession of *C*, and that the period of twelve years allowed by r. 144 for a suit for possession should be calculated from the date on which symbolical possession was delivered to him. The suit is barred, for *A*'s possession, being merely symbolical, did not operate at all as possession as against *C* who was not a

(v) *Runjit Singh v. Bunnari Lal* (1884) 10 Cal. 839; *Jaggobundhu v. Ram Chunder* (1880)

5 Cal. 584; *Jaggobundhu v. Purnanand* (1889) 10 Cal. 530.

party to the suit, and it could not therefore break the continuity of *C*'s possession (*w*). In other words, delivery of symbolical possession to *A* did *not* amount to a *disposition* of *C*. **O. 21, rr. 35-37.**

It has been stated above that where a judgment debtor himself is in possession, *actual* possession must be delivered to the person entitled to possession under sub-r. (1) of this rule or under r. 95, as the case may be. Suppose now that *symbolical* possession is delivered in a case where actual possession ought to have been delivered. Does symbolical possession given under these circumstances operate as actual possession against the judgment-debtor? It has been held by the High Court of Calcutta and Madras that it does, exactly as if symbolical possession were rightly delivered (*x*).

On the other hand, it has been held by a Full Bench of the Bombay High Court (*y*) that symbolical possession given in circumstances in which actual possession ought to have been given is a *nullity*.

Illustration.

In execution of a decree obtained by *A* against *B* certain property belonging to *B* is sold, and it is purchased by *C* in the year 1895. *B* is in possession of the property at the date of sale. *C* applies for possession, but instead of actual possession being delivered to him under r. 95, symbolical possession is given to him in the year 1905. *C* subsequently sues *B* for actual possession in the year 1908, that is, more than 12 years after the date of sale, but within 12 years from the date of delivery of symbolical possession. According to the Bombay High Court, symbolical possession given in circumstances such as those does not count as possession at all, and the period of limitation therefore commences from the date of sale, and the suit is therefore barred by limitation, according to the Calcutta and Madras High Courts the period of limitation runs from the date of delivery of symbolical possession, and it is therefore not barred.

36. Where a decree is for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.

Decree for delivery of immoveable property when in occupancy of tenant.

See notes to r. 35 above.

Arrest and detention in the civil prison.

37. (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison

Discretionary power to permit judgment-debtor to show cause against detention in prison.

(w) *Harjivan v. Shivan* (1895) 19 Bom. 620.
Ranjit Singh v. Bunwari Lal (1884) 10 Cal. 993.
 (x) *Hari Mohan v. Baburuli* (1897) 24 Cal. 715;

Govind v. Venkata (1907) 17 Mad. L. J. 598.

(y) *Mahadeo v. Janu* (1912) 36 Bom. 373 [F. B.];
Lakshman v. Aloru (1892) 16 Bom. 722.

O. 21, of a judgment-debtor who is liable to be arrested in pursu-
 cr. 37-39. ance of the application, the Court may, instead of issuing a
 warrant for his arrest, issue a notice calling upon him to appear
 before the Court on a day to be specified in the notice and
 show cause why he should not be committed to the civil prison.

(2) Where appearance is not made in obedience to the
 notice, the Court shall, if the decree-holder so requires, issue
 a warrant for the arrest of the judgment-debtor.

Discretionary power to issue notice.—When a decree is for the payment of
money, and execution is applied for against the *person* of the judgment-debtor, the
 Court *may* issue a notice to the judgment-debtor calling upon him to show cause why he
 should not be committed to the civil prison in execution of the decree. As to the
 procedure to be followed when the judgment-debtor appears in pursuance of the notice,
 see r. 40 below.

Privilege from arrest.—See s. 135, sub-section (2).

38. Every warrant for the arrest of a judgment debtor
 shall direct the officer entrusted with its
 execution to bring him before the Court
 with all convenient speed unless the amount
 which he has been ordered to pay, together with the interest
 thereon and the costs (if any) to which he is liable, be sooner
 paid.

39. (1) No judgment-debtor shall be arrested in
 execution of a decree unless and until the
 decree-holder pays into Court such sum
 as the Judge thinks sufficient for the subsistence of the judg-
 ment-debtor from the time of his arrest until he can be brought
 before the Court.

(2) Where a judgment-debtor is committed to the civil
 prison in execution of a decree the Court shall fix for his sub-
 sistence such monthly allowance as he may be entitled to accord-
 ing to the scales fixed under section 57 or, where no such scales
 have been fixed, as it considers sufficient with reference to the
 class to which he belongs.

(3) The monthly allowance fixed by the Court shall be
 supplied by the party on whose application the judgment-
 debtor has been arrested by monthly payments in advance
 before the first day of each month.

(4) The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be made to the officer in charge of the civil prison. O. 21,
rr. 39, 40

(5) Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in the civil prison shall be deemed to be costs in the suit :

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed

40. (1) Where a judgment-debtor appears before the Court in obedience to a notice issued under rule 37. or is brought before the Court after being arrested in execution of a decree for the payment of money, and it appears to the Court that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof, the Court may, upon such terms (if any) as it thinks fit, make an order disallowing the application for the arrest and detention, or directing his release, as the case may be.

(2) Before making an order under sub-rule (1), the Court may take into consideration any allegation of the decree-holder touching any of the following matters, namely:—

(a) the decree being for sum for which the judgment-debtor was bound in any fiduciary capacity to account :

(b) the transfer, concealment or removal by the judgment-debtor of any part of his property after the date of the institution of the suit in which the decree was passed, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree :

Proceedings on application of judgment debtor in obedience to notice or after arrest

O. 21,
rr. 40, 41.

- (c) any undue preference given by the judgment-debtor to any of his other creditors ;
 - (d) refusal or neglect on the part of the judgment-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it ;
 - (e) the likelihood of the judgment-debtor absconding or leaving the jurisdiction of the Court with the object or effect of obstructing or delaying the decree-holder in the execution of the decree.
- (3) While any of the matters mentioned in sub-rule (2) are being considered, the Court may, in its discretion, order the judgment-debtor to be detained in the civil prison, or leave him in the custody of an officer of the Court. or release him on his furnishing security, to the satisfaction of the Court, for his appearance when required by the Court.
- (4) A judgment-debtor released under this rule may be re-arrested.
- (5) Where the Court does not make an order under sub-rule (1), it shall cause the judgment-debtor to be arrested if he has not already been arrested and, subject to the other provisions of this Code, commit him to the civil prison.

Attachment of Property.

Examination of judgment-debtor, as to his property. 41. Where a decree is for the payment of money the decree-holder may apply to the Court for an order that—

- (a) the judgment-debtor, or
- (b) in the case of a corporation, any officer thereof. or
- (c) any other person,

be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree ; and the Court may make an order for the attendance and

examination of such judgment-debtor, or officer or other person, and for the production of any books or documents. O. 21,
rr. 41-44.

Examination of judgment-debtor.—An order for personal examination is likely to operate harshly and cause unnecessary harassment; it ought not therefore to be made unless the Court is satisfied about the *bonâ fides* of the application and urgent necessity for it (2).

42. Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money.

Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined.

Attachment under a preliminary decree.—In a suit by *A* against *B* for the recovery of possession of immovable property and for mesne profits, a preliminary decree is passed against *B* for the delivery of the property to *A* and an inquiry is directed as to the mesne profits due by *B* to *A*. *B* delivers possession of the property to *A*. Subsequently, while the inquiry as to mesne profits is yet pending, *A* applies for attachment of certain property belonging to *B*. The attachment may be allowed under this rule (a). See O. 20. r. 12.

43. Where the property to be attached is moveable property, other than agricultural produce in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof:

Attachment of moveable property other than agricultural produce in possession of judgment-debtor.

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

44. Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment,—

Attachment of agricultural produce.

(a) where such produce is a growing crop, on the land on which such crop has grown, or

(2) *National Bank v. Ghaznavi* (1916) 43 Cal. 285.
(a) See *Sharada Moyee v. Wooma Moyee* (1887) 8

O. 21,
rr. 44, 45.

(b) where such produce has been cut or gathered, on the threshing floor or place for treading out grain or the like or fodder-stack on or in which it is deposited.

and another copy on the outer door or some other conspicuous part of the house in which the judgment-debtor ordinarily resides or, with the leave of the Court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain: and the produce shall thereupon be deemed to have passed into the possession of the Court.

45. (1) Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered.

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment-debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it: and if the judgment-debtor fails to do all or any of such acts, the decree-holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree-holder shall be recoverable from the judgment-debtor as if they were included in, or formed part of, the decree.

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been severed from the soil.

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend

the execution of the order for such time as it thinks fit, and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment. O. 21,
rr. 45, 4

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered.

Attachment of debt share
and other property not in
possession of judgment
debtor

46. (1) In the case of—

- (a) a debt not secured by a negotiable instrument.
- (b) a share in the capital of a corporation.
- (c) other moveable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court.

the attachment shall be made by a written order prohibiting,—

- (i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court;
- (ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon;
- (iii) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

(2) A copy of such order shall be affixed on some conspicuous part of the Court-house, and another copy shall be sent, in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other moveable property (except as aforesaid), to the person in possession of the same.

(3) A debtor prohibited under clause (i) of sub-rule (1) may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

O. 21, rr. 46-48. **Attachment of debt.**—A debt to be attached must be *actually due* from the garnishee (judgment-debtor's debtor) to the judgment-debtor; it may be either presently payable, or payable in the future by reason of a *present obligation*. As stated by their Lordships of the Privy Council in the undermentioned case (b). "an existing debt, though payable at a future day, may be attached."

Attachment of debt after the same is paid by a cheque.—A gave a cheque to B for work done. Before the cheque was presented by B for payment, X, who had obtained a decree against B, attached in A's hands the amount due by him to B; held that A having handed over the cheque to B, the payment was complete, and there were therefore no funds of B in A's hands which could be attached (c).

Procedure where garnishee denies debt.—Where the garnishee denies the debt, the decree-holder may have it sold, or he may have a receiver appointed under s. 51 with power to him to sue the garnishee to recover the debt from him (d).

Garnishee's right of set-off.—If a cross-debt is due to the garnishee from the judgment-debtor at the date of the attachment, the garnishee is entitled to set it off against the amount due by him (e).

47. Where the property to be attached consists of the share or interest of the judgment-debtor in moveable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way.

Attachment of share in moveables.

48. (1) Where the property to be attached is the salary or allowances of a public officer or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and upon notice of the order to such officer as the Government may, by notification in the *Gazette of India* or in the local official Gazette, as the case may be, appoint in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments as the case may be.

Attachment of salary or allowances of public officer or servant of railway company or local authority.

(b) *Syud Tuffuzzool v. Rughoonath* (1871) 14 M. I. A. 40, 50.

(c) *Bhagvandas v. Abdul Hussin* (1879) 3 Bom. 49.

(d) *Tootsa v. Antone* (1887) 11 Bom. 448.

(e) *Tyaballi v. Atmarum* (1914) 38 Bom. 631.

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by the Government in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment. O. 21,
rr. 48, 49.

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule (2), shall, without further notice or other process, bind the Government or the railway company or local authority, as the case may be, while the judgment-debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of His Majesty's Indian revenues or the funds of a railway company carrying on business in any part of British India or local authority in British India; and the Government or the railway company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule.

Attachment of salary of public officer, etc.—This rule is new. It provides a special procedure for the attachment of the salary of public officers, railway servants and servants of local authorities. Under the Code of 1882 the salary of a public officer or railway servant could not be attached unless the disbursing officer was within the local limits of the jurisdiction of the Court executing the decree. This led to considerable inconvenience in the execution of decrees, and put the decree-holder in many cases to an enormous expense. The present rule substitutes a less expensive and at the same time a more effective machinery for the execution of decrees against this class of judgment-debtors. Under it the salary of a public officer or a railway servant or a servant of a local authority may be attached, *whether the judgment-debtor or the disbursing officer is or is not within the local limits of the jurisdiction of the Court executing the decree*. As to the extent to which the salary of such persons may be attached, see s. 60, cls. (h) and (i).

! 49. (1) Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

Attachment of partnership property.

(2) The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits

O. 21, rr. 49, 50. with payment of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree-holder by such partner, or as the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same.

(4) Every application for an order under sub-rule (2) shall be served on the judgment-debtor and on his partners for such of them as are within British India.

(5) Every application made by any partner of the judgment-debtor under sub-rule (3) shall be served on the decree-holder and on the judgment-debtor, and on such of the other partners as do not join in the application and as are within British India.

(6) Service under sub-rule (4) or sub-rule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served.

Attachment of partnership property.—This rule provides that no execution can issue against any *partnership property* except on a decree passed *against the firm or against the partners in the firm as such*, but a judgment-creditor of a partner in a firm may apply for an order charging *that partner's interest* and for the appointment of a receiver. The share of a partner in a partnership business is liable to attachment under s. 60 (f). As to decrees against firms, see O. 30 below.—

Execution of decree against firm

✓ 50. (1) Where a decree has been passed against a firm, execution may be granted—

(a) against any property of the partnership ;

(b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX, or

who has admitted on the pleadings that he is, O. 21, r. 50.
or who has been adjudged to be a partner ;

- (c) against any person who has been individually served as a partner with a summons and has failed to appear ;

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872.

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave and where the liability is not disputed, such Court may grant such leave or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

Scope of the rule.—This rule is new. Execution under this rule can only be granted where a decree has been passed against a *firm*. The execution may be granted *against the partnership property*. It may also be granted *against the partners*, in which case the decree-holder may proceed against the separate property of the partners. It is not to be supposed, however, that where a decree has been passed against a *firm*, execution will be granted *as a matter of course* against all the partners : in certain cases, *special leave* is necessary to issue execution against a partner. It is only when execution is applied for against a person referred to in sub-r. (1), cls. (b) and (c), that it will be granted as of course. But where execution is sought against any other person alleged to be a partner, the decree-holder must apply to the Court which passed the decree *for leave* to execute the decree against him. Thus if in a suit against a firm a person has been individually served as a partner with the writ of summons, but fails to appear at the hearing, and a decree is passed against the firm, the decree-holder is entitled to execution against him as of course : see cl. (c) of sub-r. (1). But a decree-holder is not entitled to execution as of course against a person who is sought to be

O. 21, rr. 50, 51. made liable as a partner, but who was not served with the summons and who did not appear at the hearing. In such a case the decree-holder must apply for leave to execute the decree against such person. If such person admits the liability, the leave applied for will be granted at once. But if he disputes the liability, the Court may direct an issue to determine whether he was a partner or held himself out to be a partner in the defendant firm (g). These rules follow from the peculiar nature of a suit against a firm and from the special rules as to service of summons in such a suit. To understand the present rule, it is necessary to peruse rules 3, 6 and 7 of Order 30. The important point to note is that where persons are sued as partners in the name of their firm, it is not necessary that the summons should be served upon each one of them or for the matter of that upon any one of them: it may be served upon any one or more of the partners, or at the principal place of the firm's business upon any person having the control or management of the business though he may not be a partner.

"Against any person who has appeared."—See O. 30, rr. 3, 6 and 7, and notes thereto.

Leave to issue execution.—Order 30 deals with the mode of suing firms. Rule 1 provides that two or more persons being liable as co-partners may be sued in the firm's name. It does not matter that the firm is dissolved at the date of the suit so long as the claim in respect of which the suit is brought arose during the partnership (h). Rule 3 of Order 30 provides that where the firm is dissolved to the knowledge of the plaintiff before the institution of the suit, the summons should be served upon every partner within British India whom it is sought to be made liable; if some only of several partners are served, and a decree is passed against the firm, the decree-holder is not entitled to issue execution against a partner who was not served, *not even if the decree-holder applies for leave under sub-r. (2)*. The reason is that rule 3 of Order 30 overrides sub-r. (2) of this rule. Sub-r. (2) only applies where there has been no dissolution, or none to the knowledge of the plaintiff. In order to be entitled to obtain leave under sub-r. (2), the decree-holder must have served him with the summons in accordance with the proviso to rule 3 of Order 30 (i).

Issue to determine liability.—See notes above, "Scope of the rule."

Minor partner.—The proviso to sub-r. (1) declares that nothing in that sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Contract Act. The combined effect of the section and the present rule is that where a decree has been passed against a firm containing a minor partner, execution may be granted against the property of the firm including the minor's share therein, but it cannot be granted against the separate property of the minor partner.

51. Where the property is a negotiable instrument not deposited in a Court, nor in the custody of a public officer, the attachment shall be made by actual seizure, and the instrument shall be brought into Court and held subject to further orders of the Court.

Attachment of negotiable instrument.

(g) *Davis v. Hillman & Co.* [1903] 1 K. B. 854.
(h) *Ellis v. Wadson* [1899] 1 Q. B. 714, 716.

(i) *Wigram v. Cox, Sons, Buckley & Co.* [1894] 1 Q. B. 792.

52. Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued :

Attachment or property
in custody of Court or public
officer.

O. 21,
rr. 52, 53.

Provided that, where such property is in the custody of a Court any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court.

Attachment of property in the hands of a receiver.—A receiver is an officer of the Court. An attachment therefore of money in the hands of a receiver made *without previous permission or sanction of the Court* for such attachment, is improper and irregular, and cannot be recognized by the Court (j).

Priority.—There is a conflict of decisions as to whether, where a fund in Court is attached by several decree-holders, they are entitled to share ratably as in the case of the estate of an insolvent (k), or whether they are to be paid in the order of their attachments (l).

Anticipatory attachment.—This rule applies only where the property to be attached is *in the custody* of a public officer. It does not allow of an anticipatory attachment of money *expected to reach* the hands of a public officer, and is restricted only to money *actually in his hands* (m).

53. (1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made,—

Attachment of decrees.

(a) if the decree were passed by the same Court, then by order of such Court, and, &

(b) if the decree sought to be attached was passed by another Court, then by the issue to such other Court of a notice by the Court which passed the decree sought to be executed, requesting such other Court to stay the execution of its decree unless and until—

(j) *Mahommed v. Mahommed* (1894) 21 Cal. 85 ;

Kahn v. Ali Mahomed (1892) 16 Bom. 577.

(k) *Sutkeena v. Haje Mahomed* (1913) 38 Mad.

221 : *Thakurdas v. Joseph* (1917) 44 Cal.

1072.

(l) *Tiruvangadial v. Thiruvangadiah* (1914) 26

Mad. L. J. 364.

(m) *Thakurdas v. Joseph* (1917) 44 Cal. 1072.

O. 21, r. 53.

(i) the Court which passed the decree sought to be executed cancels the notice, or

(ii) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree.

(2) Where a Court makes an order under clause (a) of sub-rule (1), or receives an application under sub-head (ii) of clause (b) of the said sub-rule, it shall, on the application of the creditor who has attached the decree of his judgment-debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1), the attachment shall be made, by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way, and, where such decree has been passed by any other Court, also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent.

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required.

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached, and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the

Court or otherwise, shall be recognized by any Court so long as the attachment remains in force. O. 21,
rr 53 54

Attachment and realization of decrees.—For the purpose of this rule decrees have been divided into two classes, namely :—

- (1) decrees for the payment of money or for sale in enforcement of a mortgage or charge, and
- (2) other decrees.

First, as to attachment of decrees.—Decrees of the first class are to be attached in the manner prescribed by sub-r. (1). Decrees of the second class are to be attached in the manner prescribed by sub-r. (4).

Next, as to realization of attached decrees.—Decrees of the first class are to be realized in the manner prescribed by sub-r. (2). There is no provision made in this rule for the realization of decrees of the 2nd class, e.g., a decree for partition, or for foreclosure of a mortgage or a decree for specific performance. Those decrees are to be realized by a sale thereof. But decrees of the first class, that is, money-decrees and mortgage-decrees, are not to be realized by sale. They can only be realized in the manner prescribed by sub-r. (2).

Decrees other than money-decrees and mortgage-decrees.—D1 holds a decree against J for partition of certain property passed by Court X. D2 obtains a decree against D1 for Rs. 6,000 in Court Y. If D1 fails to satisfy the decree obtained against him by D2, D2 may apply to Court Y to execute his (D2's) decree by attachment and sale of the decree held by D1 against J. The decree held by D1 being neither a money-decree nor a mortgage-decree, the only mode of realizing it in execution of D2's decree is by attachment and sale thereof.

Sub-rule (6): Adjustment of attached decree.—This sub-rule is new. The latter part of the rule gives effect to a Bombay decision that where a decree is attached, no adjustment of the decree subsequent to the attachment can be recognized by the Court (n). See r. 2 of this Order.

54. (1) Where the property is immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property, and then upon a conspicuous part of the Court-house, and also where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate.

(n) *Gopal v. Jolarimal* (1892) 16 Bom. 522.

O. 21, **Omission to beat the drum.**—Such an omission is a “material irregularity”
rr. 54-5-7. within the meaning of r. 90 of this Order (o).

Proclamation of sale.—See r. 64 below and notes thereto.

Removal of attachment
after satisfaction of decree.

55. Where—

- (a) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or
- (b) satisfaction of the decree is otherwise made through the Court or certified to the Court, or
- (c) the decree is set aside or reversed,

the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

56. Where the property attached is current coin or currency notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same.

Order for payment of coin
or currency notes to party
entitled under decree.

57. Where any property has been attached in execution of a decree, but by reason of the decree-holder's default, the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease.

Determination of attachment.

Object of the rule.—The object of the rule is to put an end to doubts which have arisen from time to time as to the continuance of an attachment by reason of the practice of “striking off proceedings” or “removing proceedings from the file” for which there was no justification under any of the earlier Codes.

Investigation of Claims and Objections.

O.21,r.58.

58. (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, ~~the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector. and in all other respects, as if he was a party to the suit :~~

Investigation of claims to, and objections to attachment of, attached property.

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

Postponement of sale.

Rules 58 to 63.—These rules deal with investigation of claims preferred to property attached in execution of a decree, and of objections to the attachment of such property.

Scope of the rule.—Objections to attachment raised by a *party* to the suit in which the decree under execution was passed or by his *representative* fall within the scope of s. 17. Objections to attachment raised by a *third party* come under the present rule. This distinction is important in two ways:—

1. Where an objection to attachment is made by a *party* to the suit or his *representative*, the objector should proceed by an *application under s. 47 : a separate suit for the purpose is barred*. But where an objection to attachment is made by a *third party*, the objector may *either* proceed by an *application under this rule* or he may bring a regular *suit* to establish his objection; failure to proceed by an application under this rule is no bar to a separate *suit*. The object of this rule is to give a claimant a speedy and summary remedy, but the rule does not deprive him of his remedy by *suit*. The summary remedy given by this rule is alternative to the remedy by way of suit (*p*).

2. An order made under s. 47 allowing or disallowing an objection to attachment is a "decree" (s. 2), and is therefore *appealable*. But orders under rr. 60, 61 and 62 made upon an application under this rule are *not appealable* (*q*), and the remedy of the party against whom the order is made is by a regular *suit* to establish the right which he claims to the property in dispute. Such suit must be brought within one year from the date of the order [Limitation Act, art. 11] (*r*), but subject to such suit, the order is

(p) *Sundar Singh v. Ghosi* (1896) 13 All. 410; *Krishnaswami v. Vikrama* (1895) 13 Mad. 17; *Raghunath v. Sarosh Kama* (1890) 23 Bom. 266.

(q) *Abdul v. Muhammad* (1882) 4 All. 190; *Dayaram v. Govardhandas* (1904) 28 Bom. 458.
(r) *Harishankar v. Narain* (1894) 13 Bom. 260.

O. 21,
rr. 58-60.

conclusive (s) ; see r. 63. It has been stated above that an order under r. 60, 61 or 62 is *not appealable*. The reason is that an order made under any of these rules is included in the list of appealable orders specified in O. 43, r. 1. But an order under r. 60, 61 or 62 made by a Judge on the original side of the *High Court* of Calcutta, Madras, or Bombay is a "judgment" within the meaning of clause 15 of the Charter, and is therefore *appealable under that clause (l)*.

The following illustration shows the operation of rr. 58-62. In execution of a decree obtained by *A* against *B* certain property alleged to belong to *B* is attached. If the property attached is claimed by *C*, *C* may bring a regular suit for a declaration that the property attached belongs to him and for removal of the attachment. Or, if he desires to avail himself of the speedy remedy provided by this rule, he may present an *application* to the Court executing the decree claiming that the property belongs to him and for the removal of the attachment. If *C* adopts the latter course and his claim is allowed (r. 60), *A* (decree-holder) may bring a suit under r. 63 for a declaration that the property belongs to *B* (judgment-debtor), and is therefore liable to attachment. And if *C*'s claim is disallowed (r. 61), he may bring a suit for a declaration that the property attached belongs to him, and is therefore not liable to attachment. If no such suit is brought within one year from the date of the order under r. 60 or 61, the order will be conclusive.

Objections to attachment, though made by *parties* to a suit or their *representatives*, come within the scope of this rule if the objection is based on the ground that the property attached is held by them *on behalf of a third party* as a trustee, guardian, or in other fiduciary capacity.

Rules 58 to 63 apply to "debts" also.—*A* obtains a decree against *B* for Rs. 5,000, and attaches in execution of the decree a debt alleged to be due by *C* to *L*. Can *C* apply under this rule to have the attachment removed? Yes; and if the attachment is not removed, he may institute a suit for a declaration that no debt is due from him to *B*. The suit must be brought within a year from the date of the order against him. If no such suit is filed, the order will be conclusive against him (u).

59. The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

Evidence to be adduced
by claimant.

60. Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was in his possession, not on his own account

Release of property from
attachment.

(s) *Rahim Bux v. Abdul Kader* (1903) 32 Cal. 537;
Sardhari Lal v. Ambika Pershad (1888) 15
Cal. 321, 326, 15 I. A. 123.
(t) *Sabhapathi v. Narayanasami* (1902) 25 Mad.

555.

(u) *Chidambaram v. Ramasamy* (1904) 27 Mad. 67;
Tagaballi v. Almarum (1914) 33 Bom. 631.

or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment. O. 21,
rr. 60-63.

Effect of order of release.—An order made under this rule releasing the property attached from attachment is only provisional and liable to be set aside by a regular suit (r. 63). “It is not conclusive; a suit may be brought to claim the property, notwithstanding the order (v). It has not the effect therefore of putting an end to an attachment duly made, so as to leave the claimant free to deal with the property as he likes. If a suit is brought by the decree-holder to establish his right to attach the property, and a decree is passed for him, the effect of the decree is to set aside the order of release, and to maintain the attachment originally made. The result is that any private transfer of the property by the claimant, though made after an order under this rule releasing the property from attachment, will be void under s. 64, if the right to attach is subsequently established by a suit under r. 63 (w). In execution of a decree obtained by A against B certain property standing in the name of C (B’s son) is attached. C objects to the attachment, and the property is released from attachment under this rule. C then mortgages the property to M. A then sues B and C for a declaration that B, and not C, is the real owner of the property, and that the property is therefore liable to be sold in execution of his decree against B, and a decree is passed in his favour. The property is then re-attached and sold in execution of A’s decree, and purchased by P. The mortgage to M is a transfer contrary to the attachment within the meaning of s. 64, and P takes the property free from the mortgage.

61. Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.

62. Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge.

63. Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in

(v) *Sardhari Lal v. Ambika Pershad* (1898) 15 Cal. 521, 15 I. A. 123.
(w) *Bonomali v. Prasunno* (1896) 23 Cal. 829;

Ram Chandra v. Mudeeshwar (1906) 33 Cal. 1158; *Ali Ahmad Khan v. Banoishar* (1909) 31 All. 367.

O. 21, dispute, but subject to the result of such suit, if any, the order
rr. 63, 64. shall be conclusive.

Scope of the rule.—This rule provides that unless the party against whom an order is made under r. 60, 61 or 62 institutes a suit to establish the right which he claims to the property in dispute [within the period of a year from the date of the order as provided by *art. 11 of the Limitation Act, 1908*], the order made against him shall be conclusive.

"Subject to the result of such suit, the order shall be conclusive."—This means that unless the suit is brought as provided by this rule, the party against whom the order is made cannot assert, either as plaintiff or as defendant in any other suit or as a party to any other proceeding, the right denied to him by the order (*x*). *A* obtains a decree against *B*, and in execution of the decree attaches certain property alleged to belong to *B*. *C* claims that he is in possession of the property under a sale from *B* of a date prior to the attachment, and applies that the property be released from attachment. The executing Court finds that *C* was in possession at the date of the attachment, but that the sale to him was fictitious and disallows *C*'s claim. No suit is brought by *C* within the period of a year to establish his right to the property. The property is then sold in execution, and purchased by *P*. *P* then sues *C* for possession. *C* is precluded in this suit from again asserting his right as purchaser from *B*. No suit having been brought by him within the period of limitation, the order disallowing his claim became *conclusive* against him under this rule.

Payment by claimant under protest.—If the claimant fails, and the attachment is not removed, he is not compelled to bring a suit under this rule for a declaration of his title to the property. He may prevent the sale of the property by paying the decretal amount to the decree-holder, and then sue for it as money paid under compulsion of law, *i.e.*, under pressure of execution-proceedings (*y*). Further the claimant is not bound to take proceedings under the Code to set aside the attachment. He may pay the amount of the decree under protest, and then sue as stated above (*z*).

Sale generally.

64. Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

Power to order property attached to be sold and proceeds to be paid to person entitled.

x) *Nemagunda v. Paresha* (1898) 22 Bom. 640;
Surnamoyi v. Ashutosh (1900) 27 Cal. 714;
Kojjaya v. Doosy (1906) 29 Mad. 225.
y) *Dulichund v. Ramkishan* (1881) 7 Cal. 648, 8
I. A. 93; *Jugdeo v. Raja Singh* (1888) 15

Cal. 856. See also *Jasvatimgji v. Secretary of State* (1890) 14 Bom. 299.
z) *Kanhaya Lal v. National Bank of India* (1913) 40 Cal. 598, 40 I. A. 50.

65. Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction in manner prescribed.

Sales by whom conducted and how made.

O. 21,
rr. 65, 66.

“ Save as otherwise prescribed.”—See 1. 76 below.

66. (1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

Proclamation of sales by public auction

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

- (a) the property to be sold ;
- (b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government ;
- (c) any incumbrance to which the property is liable ;
- (d) the amount for the recovery of which the sale is ordered ; and
- (e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any

O. 21, person whom it thinks necessary to summon and may examine
 rr. 66, 67. him in respect to any such matters and require him to produce
 any document in his possession or power relating thereto.

Specification of property to be sold.—See notes to r. 90 below, “Material irregularity in publishing or conducting sale,” No. 1.

Specification of revenue.—See notes to r. 90 below, “Material irregularity in publishing or conducting sale,” Nos. 1 and 2.

Specification of incumbrances.—See notes to r. 90 below, “Material irregularity in publishing or conducting sale,” No. 1.

Sale by Court—Duty of Court.—In a case in which the terms of the proclamation were not clearly explained by the officer of the Court conducting the sale to a person present at the sale who asked that the terms be explained, and such person was thereupon misled into buying property which was subject to mortgages amounting to more than its value, the Judicial Committee in setting aside the sale observed: “In sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. It would be disastrous, it would be absolutely shocking, if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain so illusory and so unconscientious as this” (a).

Irregularity in publishing sale.—See notes to r. 90 below, “Material irregularity in publishing or conducting sale.”

67. (1) Every proclamation shall be made and published, as nearly as may be, in the manner
Mode of making proclamation. prescribed by rule 54, sub-rule (2).

(2) Where the Court so directs, such proclamation shall also be published in the local official Gazette or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale.

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given.

Non-compliance with the provisions of this rule.—Omission to carry out the provisions of this rule does not render the sale void. Such an omission, however, amounts to a “material irregularity” within the meaning of r. 90 below, and the sale may be set aside if the Court is satisfied that substantial injury has resulted from the irregularity (b). [The reader is advised to read r. 90 at this stage, and note particularly the proviso to that rule.]

(a) *Kala Nisa v. Harperink* (1908) 36 Cal. 323, 334, 36 I. A. 32, 37. | (b) *Nana Kumar v. Goleam Chunder* (1891) 18 Cal. 422.

68. Save in the case of property of the kind described in the proviso to the rule 43, no sale hereunder shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immoveable property, and of at least fifteen days in the case of moveable property, calculated from the date on which the copy of the proclamation has been affixed on the Court-house of the Judge ordering the sale.

O. 21,
rr. 68-70.

Time of sale.

Non-compliance with the provisions of this rule.—If a sale is held before the expiration of the period prescribed by this rule, it is not void, but the case is one of material irregularity within the meaning of r. 90, and the sale will be set aside if the Court is satisfied that substantial injury has resulted from the irregularity (c).

69. (1) The Court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reason for such adjournment:

Adjournment or stoppage of sale.

Provided that, where the sale is made in, or within the precincts of, the Court-house, no such adjournment shall be made without the leave of the Court.

(2) Where a sale is adjourned under sub-rule (1) for a longer period than seven days, a fresh proclamation under rule 67 shall be made, unless the judgment-debtor consents to waive it.

(3) Every sale shall be stopped if before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale.

Omission to fix hour for sale.—Such an omission amounts to a “material irregularity” within the meaning of r. 90 below (d).

Omission to issue fresh proclamation.—Such an omission amounts to a “material irregularity” within the meaning of r. 90 below (e).

70. Nothing in rules 66 to 69 shall be deemed to apply to any case in which the execution of a decree has been transferred to the Collector.

Saving of certain sales.

(c) *Tasadduk v. Ahmed* (1894) 21 Cal. 66 20 I. A. 176. { (d) *Mahabir v. Dhanukihari* (1904) 31 Cal. 815.
(e) *Bagal Chunder v. Rameshwar* (1891) 18 Cal. 496.

O. 21,
r. 70-72.

Execution of decrees by Collector.—See ss. 68 to 72, and the third Schedule.

71. Any deficiency of price which may happen on a re-sale by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court or to the Collector or subordinate of the Collector, as the case may be, by the officer or the person holding the sale, and shall, at the instance of either the decree-holder or the judgment-debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money.

Defaulting purchaser answerable for loss on re-sale.

72. (1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

Decree-holder not to bid for or buy property without permission.

(2) Where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of section 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

Where decree-holder purchases, amount of decree may be taken as payment.

(3) Where a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale; and the costs of such application and order, and any deficiency of price which may happen on the re-sale, and all expenses attending it, shall be paid by the decree-holder.

No separate suit.—Where a decree-holder without leave of the Court buys the property of the judgment-debtor at a Court sale, the remedy of the latter is by application under this rule and s. 47, and not by a separate suit: a separate suit is barred under s. 47. The question whether the sale should be set aside or not is a question between the "parties to the suit" relating to the "execution" of the decree within the meaning of s. 47, and it must therefore be decided by the Court executing the decree, and not by a separate suit (f). Note the words "may by order set aside the sale" in sub-r. (3).

(f) *Genu v. Sakharan* (1898) 22 Bom. 271; *Durga v. Bahwant* (1901) 23 All. 478; *Viraraghava v. Venkata* (1893) 16 Mad. 287.

"The Court may, if it thinks fit, set aside the sale."—These words clearly show that a purchase by a decree-holder without permission is not *ipso facto* void, such purchase is valid until it is set aside under this rule (g). In determining whether the sale should be set aside, the Court should take into consideration whether the property has been sold at an adequate or inadequate price (h). The sale may be set aside even after confirmation (i).

O. 21,
rr. 72-74.

Settling off decretal amount against purchase money.—It may be one of the terms on which the permission to bid is granted that there should not be this right of set off. In such a case no set off can be directed (j).

73. No officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold.

Restriction on bidding or
purchase by officers

COMPARE Transfer of Property Act, s. 131.

Sale of moveable property.

74. (1) Where the property to be sold is agricultural produce, the sale shall be held,—

Sale of
agricultural pro-
duce

- (a) if such produce is a growing crop, on or near the land on which such crop has grown, or,
- (b) if such produce has been cut or gathered, at or near the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited :

Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage.

(2) Where, on the produce being put up for sale,—

- (a) a fair price, in the estimation of the person holding the sale, is not offered for it, and
- (b) the owner of the produce or a person authorized to act in his behalf applies to have the sale postponed till the next day or, if a market is held at the place of sale, the next market-day,

(g) *Ganesh v. Gopal* (1917) 41 Bom 357.
(h) *Mathura v. Nathani* (1885) 11 Cal 731.

(i) *Thathu v. Kondu* (1909) 32 Mad 242.
(j) *Hazarimal v. Namdev* (1908) 32 Bom. 379.

O. 21, the sale shall be postponed accordingly and shall be then
r. 74-78. completed, whatever price may be offered for the produce.

75. (1) Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been stored, ^{Special provisions relating to growing crops} the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing.

(2) Where the crop from its nature does not admit of being stored, it may be sold before it is cut and gathered, and the purchaser shall be entitled to enter on the land, and to do all that is necessary for the purpose of tending and cutting or gathering it.

76. Where the property to be sold is a negotiable instrument or a share in a corporation, the ^{Negotiable instruments and shares in corporations} Court may instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker.

77. (1) Where moveable property is sold by public auction the price of each lot shall be ^{Sale by public auction} paid at the time of sale or as soon after as the officer or other person holding the sale directs, and in default of payment the property shall forthwith be re-sold.

(2) On payment of the purchase-money, the officer or other person holding the sale shall grant a receipt for the same, and the sale shall become absolute.

(3) Where the moveable property to be sold is a share in goods belonging to the judgment-debtor and a co-owner, and two or more persons, of whom one is such co-owner, respectively bid the same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the co-owner.

78. No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale ; but any person sustaining any injury by reason of such irregularity at the hand ^{Irregularity not to vitiate sale, but any person injured may sue.}

of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery. O. 21,
rr. 78-80.

Scope of the rule.—This rule provides for the case of irregularity in publishing or conducting the sale of *moveable* property. Rule 90 deals with irregularity in publishing or conducting the sale of *immovable* property.

79. (1) Where the property sold is moveable property of which actual seizure has been made, it shall be delivered to the purchaser.

(2) Where the property sold is moveable property in the possession of some person other than the judgment-debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.

(3) Where the property sold is a debt not secured by a negotiable instrument, or is a share in a corporation, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser.

80. (1) Where the execution of a document or the endorsement of the party in whose name a negotiable instrument or a share in a corporation is standing is required to transfer such negotiable instrument or share, the Judge or such officer as he may appoint in this behalf may execute such document or make such endorsement as may be necessary, and such execution or endorsement shall have the same effect as an execution or endorsement by the party.

O. 21, (2) Such execution or endorsement may be in the fol-
r. 80-83. lowing form, namely :

A. B. by C. D., Judge of the Court of (or as the case may be), in a suit by E. F. against A. B.

(3) Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon and to sign a receipt for the same ; and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself.

81. In the case of any moveable property not herein-
before provided for, the Court may make
Vesting order in case of
other property, an order vesting such property in the
purchaser or as he may direct ; and such
property shall vest accordingly.

Sale of immoveable property.

82. Sales of immoveable property
What Courts may order
sales, in execution of decrees may be ordered by
any Court other than a Court of Small
Causes.

83. (1) Where an order for the sale of immoveable
property has been made, if the judgment-
debtor can satisfy the Court that there is
Postponement of sale to
enable judgment-debtor to
raise amount of decree reason to believe that the amount of the
decree may be raised by the mortgage or
lease or private sale of such property, or some part thereof, or
of any other immoveable property of the judgment-debtor, the
Court may, on his application, postpone the sale of the prop-
erty comprised in the order for sale on such terms and for
such period as it thinks proper, to enable him to raise the
amount.

(2) In such case the Court shall grant a certificate to
the judgment-debtor authorizing him within a period to be
mentioned therein, and notwithstanding anything contained
in section 64, to make the proposed mortgage, lease or sale :

Provided that all monies payable under such mortgage, lease or sale shall be paid, not to the judgment-debtor, but, save in so far as a decree-holder is entitled to set off such money under the provisions of rule 72, into Court : O. 21,
rr. 83-85.

Provided also that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the Court.

(3) Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage of, or charge on, such property.

Confirmation of sale by Court.—Where permission to raise the amount of decree by private sale has been granted to the judgment-debtor by two Courts in each of which there has been a decree passed against him, it is enough if the sale is confirmed by one Court : it is superfluous to apply to the other Court for confirmation of the same sale (*k*).

✓ 84. (1) On every sale of immoveable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. on the amount of his purchase-money to the officer or other person conducting the sale and, in default of such deposit, the property shall forthwith be re-sold.

Deposit by purchaser and re-sale on default.

(2) Where the decree-holder is the purchaser and is entitled to set off the purchase-money under rule 72, the Court may dispense with the requirements of this rule.

Material Irregularity.—It has been held by the High Court of Allahabad that if the deposit of 25 per cent. is not made immediately, there is no sale, and that the property should be forthwith put up again and sold (*h*). On the other hand, it has been held by the High Courts of Calcutta and Madras that failure to deposit the 25 per cent. as required by this rule is no more than a “material irregularity” within the meaning of r. 90, which would render the sale voidable if substantial injury has resulted by reason of such irregularity (*m*).

85. The full amount of purchase-money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property :

Time for payment in full of purchase-money.

(k) *Andanapa v. Bhimrao* (1895) 19 Bom. 530.
(l) *Amir Begam v. Bank of Upper India, Ltd.* (1908) 30 All. 273.

(m) *Bhim v. Sarwan* (1880) 10 Cal. 83; *Venkata v. Sama* (1891) 14 Mad. 227.

O. 21,
rr. 85-88. Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 72.

" Shall be paid by the purchaser."—The purchaser is bound to see that the money reaches the Court in time to satisfy the requirements of this rule. If the purchase-money is not received by the Court in time, it will not avail him to say that he had posted the money in time, for the Post Office is not the agent of the Court (n).

Where the Court or office is closed on the fifteenth day.—In such a case the payment may be made on the next day on which the Court or office is open. S. General Clauses Act 10 of 1897. s. 10.

86. In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government and the property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold.

Forfeiture of deposit to Government.—The old section provided that the deposit "*shall be forfeited to Government.*" This provision led to hardship in certain cases. To obviate any hardship that may arise, the words "*may, if the Court thinks fit,*" have been substituted for the word "*shall.*" It is no longer obligatory upon the Court to forfeit the deposit *in every case.*

87. Every re-sale of immoveable property, in default of payment of the purchase-money within the period allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale.

Fresh notification.—A fresh notification is only necessary when the re-sale is in default of payment of the *purchase-money* within the time allowed by r. 85. No fresh notification is necessary for a re-sale in default of payment of the 25 per cent deposit required by r. 84 (o).

88. Where the property sold is a share of undivided immoveable property and two or more persons, of whom one is a co-sharer, respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharer.

See as to moveable property, r. 77, sub-r. (3) above.

89. (1) Where immoveable property has been sold **O.21,r.89.**
in execution of a decree, any person,
Application to set aside sale on deposit. either owning such property or holding
an interest therein by virtue of a title
acquired before such sale, may apply to have the sale set
aside on his depositing in Court,—

(a) for payment to the purchaser, a sum equal to five
per cent. of the purchase-money, and

(b) for payment to the decree-holder, the amount
specified in the proclamation of sale as that for the
recovery of which the sale was ordered, less any
amount which may, since the date of such pro-
clamation of sale, have been received by the decree-
holder.

(2) Where a person applies under rule 90 to set aside
the sale of his immoveable property, he shall not, unless he
withdraws his application, be entitled to make or prosecute
an application under this rule.

(3) Nothing in this rule shall relieve the judgment-
debtor from any liability he may be under in respect of costs
and interest not covered by the proclamation of sale.

Who may apply under this rule.—The application to set aside a sale of im-
moveable property held in execution of a decree may under this rule be made by—

(1) any person owning the property, or

(2) any person holding an interest in such property by virtue of a title acquired
before the sale.

Any person owning the property.—The property may be owned by the judg-
ment-debtor, or it may be owned by some other person and sold as the property of
the judgment-debtor. *A* transfers (by way of gift or sale) certain immoveable property
to *B*. Subsequently the property is attached and sold as *A*'s property in execution of
a decree obtained by *C* against *A*. *B*, as the *person owning the property*, may apply
under this rule to set aside the sale.

**Any person holding an "interest" in the property by virtue of a title
acquired before the sale.**—A co-sharer may apply under this rule, for he has an
interest in the property (*p*). And so also a mortgagee (*q*). But a person who *has merely
agreed* to purchase the property cannot apply under this rule, for a more contract for

(*p*) *Tuhi Ram v. Izzat Ali* (1908) 30 All 192, 195-196. } (*q*) *Parash Nath v. Natabopal* (1902) 29 Cal. 1.

O. 21,
rr. 89, 90.

sale of immoveable property does not of itself create *any interest* in the property (r). A co-heir also may apply under this rule (s).

Deposit of 5 per cent.—This deposit must be made, though the decree-holder may himself be the purchaser. The five per cent. is intended as a compensation to the purchaser for his trouble and disappointment for the loss of that which was, perhaps, a good bargain (t).

“For payment to the decree-holder”—Rateable distribution.—The expression “decree-holder” in cl. (b) of sub-sec. (1) refers to that person alone for satisfaction of whose decree the sale had been ordered. It does not include other decree-holders who would have a right to claim rateable distribution out of the sale proceeds under sec. 73. It is therefore enough if the judgment-debtor deposits such amount as is sufficient to satisfy the claim of the decree-holder at whose instance the property was sold. It is not necessary that the amount deposited by him should be sufficient to satisfy decrees held against him by other decree-holders also (u). Further, when a judgment-debtor deposits in Court a sum sufficient to satisfy the claim of the person for satisfaction of whose decree the property was ordered to be sold, the other decree-holders are not entitled to a rateable distribution thereof under s. 73 (v).

Sub-rule (2).—Where a person applies to set aside a sale under this rule and *subsequently* applies under r. 90, he is not entitled to *prosecute* the application made by him under this rule (w). But an application, though purporting to be made under r. 90, may not really be one under that rule, but one under s. 47: the provisions of sub-r. (2) do not apply to such a case (x).

Sale of property by separate lots.—Where property is sold by separate lots in execution of a decree, it is not open to the judgment-debtor to apply under this rule to set aside the sale of some only of such lots. The application must be to set aside the sale of all the lots (y).

✓ **90. (1)** Where any immoveable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it :

Application to set aside sale on ground of irregularity or fraud.

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(r) *Mahadeo v. Vasudeo* (1890) 23 Bom. 181.
(s) See *Abdul v. Motiyar* (1903) 30 Cal. 425.
(t) *Tirumal v. Syed Dasaghir* (1899) 22 Mad. 280.
(u) *Ganesli v. Fikhal* (1912) 37 Bom. 387.
(v) *Harai v. Faizur* (1913) 40 Cal. 619.

(w) *Rajendra v. Nil Ratan* (1896) 23 Cal. 958.
(x) *Harihar Kant v. Ruma Pandu* (1909) 33 Bom. 698.
(y) *Kripanath v. Ram Lakshmi* (1897) 1 C. W. N. 703.

Who may apply under this rule.—The only persons that may apply under O.21, r.90. this rule are—

- (1) the decree-holder,
- (2) Any person entitled to share in a rateable distribution of assets under s. 73 ; and
- (3) any person whose interests are affected by the sale—an expression obviously of a wider import than the expression “a person holding an interest in the property sold” used in r. 89 above (2).

A purchaser at a Court sale, who seeks to set aside the sale on the ground that he was induced by fraud to pay a larger price for the property, is not entitled to apply under this rule (a), for though he may sustain injury by reason of the fraud, it cannot be said that his title to the property is affected by the sale.

Scope of the rule.—A sale held in execution of a decree may be set aside under this rule only if the following conditions are present :—

1. There must be a *material irregularity or fraud*.
2. The material irregularity or fraud must be in *publishing or conducting the sale*.
3. The applicant must have sustained *substantial injury*.
4. Such injury must have been caused by *reason of* the material irregularity or fraud.

Material irregularity in publishing or conducting sale.—The following are instances of material irregularity in publishing or conducting a sale in execution :—

1. Omission to specify in the proclamation of sale the extent of the property to be sold, or the revenue assessed on it (b), or the amount of income derived from it, or the incumbrances to which the property is subject (c) : see r. 66 of this Order.
2. Mis-statement of the value of the property or of Government revenue in the proclamation of sale such as is calculated to mislead intending bidders (d), see r. 66 of this Order.
3. Omission to affix a copy of the sale proclamation as required by r. 67 of this Order (e).
4. Omission to have a drum beaten as required by r. 67 of this Order read with rule 54 (f).
5. Holding a sale of immoveable property before the expiration of 30 days from the date on which the copy of the proclamation has been affixed on the Court-house of the Judge ordering the sale (g) : see r. 68 of this Order.

(c) *Abdul Aziz v. Tufayyidin* (1914) 19 C. W. N. 326, 328. See *Hardwar Lal v. Salamat-ul-lah* (1914) 38 All. 358.

(a) *Birj Mohun v. Rai Uma Nath* (1893) 20 Cal. 8, 19 I. A. 154.

(b) *Athappa v. Ramakrishna* (1898) 21 Mad. 51 ; *Madarsa v. Palaniappa* (1900) 23 Mad. 628.

(c) *Moti aul v. Bhawanji* (1902) 9 C. W. N. 836.

(d) *Saudatmand v. Phul Kuar* (1898) 20 All. 412,

23 I. A. 146 ; *Mahabir Pershad v. Olpherts* (1893) 9 Cal. 656, 10 I. A. 25 ; *Gurdhar Singh v. Murdeo Narain* (1876) 20 W. R. 44, 3 I. A. 230.

(e) *Nana Kumar v. Golam Chunder* (1891) 18 Cal. 422.

(f) *Trimbak v. Nana* (1880) 10 Bom. 504.

(g) *Tasadduk v. Ahmad* (1894) 21 Cal. 66, 20 I. A. 176.

O. 21, r. 90.

6. Non-specification of the hour to which a sale is adjourned (*h*) sec 1 69 of this Order
- 7 Omission to issue a fresh proclamation where a sale is adjourned for more than seven days (*i*), unless the proclamation has been waived (*j*) Where a sale proclamation had been issued at the instance of the judgment debtor six times and a fresh proclamation was subsequently issued notifying that in the absence of any order of postponement the sale would be held at the monthly sales commencing on 13th July 1903 at Monghyr, but the monthly sales did not begin until 17th July, owing to the absence of the presiding officer from the station and the sale in question was held on 20th July in the course of the monthly sales, without a fresh proclamation, then Lordship of the Privy Council expressed the opinion that in holding the sale on 20th July, the Court did not act in contravention of the provisions of the Code and that there was no irregularity in publishing the sale and held that assuming there was irregularity, there was no evidence of substantial injury and that the sale was therefore valid (*l*) sec 1 69 of this Order
- 8 Default in payment of the deposit of 25 per cent as required by r 54 of this Order (*l*) See notes to r 54
- 9 Omission on the part of the plaintiff to have a *guardian ad litem* appointed of a defendant, where *after* decree, but *before* sale, the defendant has been adjudged to be of unsound mind (*m*) sec O 32, r 15
- 10 Where property belonging to a judgment debtor was attached and the judgment debtor died pending the attachment leaving a widow and a minor son, but no notice of the subsequent proceedings in attachment was served on any person representing the minor further though the property consisted of 109 mouzahs, the proclamation of sale was read out without beat of drum in one only of the mouzahs and affixed to a tree in that village, and, further, the proclamation did not specify the encumbrances to which the property was liable, but stated merely the annual profit income and the value of the property and the property was sold at a gross under valuation then Lordships of the Privy Council held that the above irregularities were all material irregularities and they accordingly set aside the sale (*n*)

It is to be noted in this connection that if the act or omission complained of amounts to a material *irregularity*, the sale is not void, but voidable. Being voidable it is liable to be set aside under this rule on the application of any of the persons mentioned in the rule. But it is important to note that it will not be set aside *unless* it is proved that *substantial injury* has resulted from the irregularity see the proviso to the rule. But where the act or omission complained of amounts to an *illegality*, it renders the sale void *ab initio*, and no proof of *injury* is required. In cases (3), (5), (8) and (9) above it was contended that the omission complained of amounted to an *illegality*, and that the sale was therefore void *ab initio* and that it should therefore be declared void without proof

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| <p>(h) <i>Surno Moyee v. Daklina</i> (1897) 24 Cal 291.
 <i>Bhikari v. Surja Moni</i> (1901) 6 C W N 43
 (i) <i>Gopee Nath v. Luchmeeput</i> (1878) 3 Cal 542
 (j) <i>Bipin Behari Mitra v. Jalindranath</i> (1910) 37 Cal 897
 (k) <i>Lal Rang Singh v. Rataneshwar</i> (1911) 39 Cal</p> | <p>26 38 I A 200
 (l) <i>Ahmad Baksh v. Jaita</i> (1900) 25 All 235.
 <i>Bhim Singh v. Sarwan</i> (1889) 16 Cal 53
 (m) <i>Narayana v. Kahanasundram</i> (1896) 19 Mad 21
 (n) <i>Krishna Pershad v. Motchand</i> (1913) 40 C 636, 40 I A 140</p> |
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f substantial injury. But it was held that the omission amounted to a material irregularity only, and the sale was not void but voidable only, and it could not therefore be set aside unless *substantial injury* was proved. See notes to s. 63, "Sale when void and when voidable." **O.21,r.90.**

"Publishing or conducting the sale."—This rule applies only where an irregularity has been committed in *publishing or conducting the sale*. Hence this rule does not apply if the sale is sought to be set aside on the ground that the decree in execution of which the property was sold was obtained without service of summons on the judgment-debtor (o), or that it was obtained by fraud (p), or that the Court that sold the property had no jurisdiction to sell the same (q), or that execution of the decree was time-barred (r), or that the property sold was not saleable property within the meaning of s. 60 (s). None of these cases involves any "irregularity in publishing or conducting the sale." In all these cases the remedy of the party seeking to set aside the sale is by a *regular suit*.

Fraud in publishing or conducting sale.—The words "or fraud" are new. The present rule requires that an application to set aside a sale on the ground of fraud in publishing or conducting the sale should be made *under this rule*.

The observations of their Lordships of the Privy Council in *Lala Bunsedhur v. Zoonwar Hindustani* (t) have a material bearing on the question as to when a sale should be set aside on the ground of fraud (u). In that case their Lordships said that where a sale was impeached on the ground of fraud, a difference must be made between an innocent purchaser and one tainted by the fraud which has brought about the execution sale. "The question is, in the former case, which of two innocent parties shall suffer; in the latter, whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrong-doing. A Court exercising equitable jurisdiction may withhold its aid in the one case, and yet set aside the sale with or without terms in the other."

A charge against a decree-holder that he and those who acted in concert with him have acted in such a manner as to prevent the best price from being obtained *does not of itself* amount to a charge of fraud within the meaning of this rule. A obtains a decree against B, and obtains leave to bid at the auction sale. A then enters into an agreement with a third person that if that person would not bid at the sale, A would sell the property to him if A should become the purchaser. The property is put up for sale and purchased by A. The agreement does not constitute a fraud within the meaning of this rule, though it may have discouraged competition at the auction (v). In a recent case Sir Lawrence Jenkins, C.J., said: "The word 'fraud' is very loosely used in this class of cases [that is cases under r. 90]: any irregularity is taken to be fraud with the consequence that such a finding involves. But a finding of fraud should be reserved for that which is dishonest and morally wrong; and it is not sufficient to come to a vague finding of fraud: actual fraud must be established" (w).

Substantial injury.—Material irregularity or fraud standing by itself is no ground for setting aside a sale. There must be *substantial injury* occasioned by the

(t) *Net Lall v. Sheikh Kareem* (1896) 23 Cal. 686, 689.

(v) *Khagendra v. Pran Nath* (1902) 29 Cal. 395, 29 I. A. 199.

(w) *Shirin v. Agha Ali Khan* (1896) 18 All. 141, 145.

(x) *Gangathara v. Rathbali* (1883) 6 Mad. 237.

(y) *Ramchathar Mir v. Bachu Bhagat* (1885) 7 All. 611; *Omed v. Jas Ram* (1907) 20

All. 612, 614.

(t) (1890) 10 M. I. A. 454, 473-474.

(u) *Pareek Nath v. Hari Charan* (1911) 38 Cal. 622, 626.

(v) *Mahomed Mira Ravulkar v. Savasi Vijaya Ragunadha* (1900) 23 Mad. 227, 27 I. A. 17.

(w) *Pareek Nath v. Hari Charan* (1911) 38 Cal. 622, 626.

O. 21. irregularity or fraud (x). The substantial injury alleged by the application must be proved: it cannot be assumed from the mere fact that there was a material irregularity or fraud in publishing or conducting the sale. The mere fact that there was a material irregularity or fraud in publishing or conducting the sale, will not justify the Court in assuming that substantial injury has thereby been caused. Hence although an applicant under this rule may prove material irregularity, such as non-specification of Government revenue in the proclamation of sale (y), or inadequate description of the property sold (z), or the holding of the sale before the expiry of the period prescribed by r. 68 of this Order (a), the sale will not be set aside, unless it is proved that had it not been for the irregularity the property would have realized a substantially larger price than what it did at the sale. The same rule applies where the sale is impeached on the ground of fraud.

Application by purchaser to set aside sale on ground of judgment-debtor having no saleable interest.

91. The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold.

Scope of the rule.—This rule enables the Court to relieve a purchaser on the ground that the judgment-debtor had no saleable interest in the property. It does not apply where a sale is sought to be set aside by an auction-purchaser on the ground that he had been induced by *misrepresentation or concealment* to buy the property for more than its real value (b). The remedy of the purchaser in such a case is by a regular suit.

Saleable interest.—This rule applies only where a judgment-debtor has no saleable interest *at all*. Hence the rule does not apply if the judgment-debtor has even a partial interest in the property sold (c), however small that interest may be. In other words, a purchaser is not entitled to have a sale set aside under this rule on the ground that the judgment-debtor had a saleable interest in a very small portion of the property, and had no saleable interest in a *major* portion of the property (d).

92. (1) Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.

Sale when to become absolute or be set aside.

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale :

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| (x) <i>Harbans Lal v. Kundan Lal</i> (1899) 21 All. 140. | (b) <i>Brij Mohun v. Rai Uma Nath</i> (1893) 20 Cal. 8, 10 I. A. 154. |
| (y) <i>Macnaghten v. Mahabir Pershad</i> (1853) 9 Cal. 358, 10 I. A. 25. | (c) <i>Ram Coomarr v. Shushee</i> (1893) 9 Cal. 626 ;
<i>Ram Narain v. Dwarkanath</i> (1900) 27 Cal. 204. |
| (z) <i>Arunachellam v. Arunachellam</i> (1889) 12 Mad. 19, 15 I. A. 171. | (d) <i>Sonaram v. Mohiram</i> (1901) 28 Cal. 235. |
| (a) <i>Tasadduk v. Ahmad</i> (1894) 21 Cal. 66, 20 I. A. 170. | |

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby. **O. 21, rr. 92, 93.**

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

No suit will lie to set aside an order made under this rule.—No suit will lie to set aside an order made under this rule by any person against whom such order is made. The party against whom the order is made has a remedy by way of appeal under O. 43, r. 1, cl. (j). Now an order under this rule may be—

- (1) either an order confirming the sale, or
- (2) an order setting aside the sale.

Sub-1. (3) makes it quite clear that whatever the order may be, whether it is one confirming the sale or one setting aside the sale, no suit will lie to set aside the order.

Appeal to the Privy Council.—An appeal lies to His Majesty in Council from an order passed under this rule and r. 90 (e).

93. Where a sale of immoveable property is set aside under rule 92, the purchaser shall be entitled to an order for repayment of his purchase-money, with or without interest as the Court may direct, against any person to whom it has been paid.

Return of purchase-money
in certain cases.

Scope of the rule.—A purchaser may, under r. 91, resist confirmation of the sale; while under this rule he may apply after confirmation for a refund of the purchase-money on the ground that the judgment-debtor had no saleable interest in the property (f). But no refund could be made under this rule if the judgment-debtor had some saleable interest in the property, however small it might be (g).

Regular suit.—The purchaser is not limited, where the judgment-debtor has no saleable interest in the property, to the procedure prescribed by this rule. It is competent to him to proceed by a regular suit to recover the purchase-money (h). In a recent case, however, the High Court of Allahabad held that under the present Code the purchaser is not entitled to a refund of the purchase-money except by an application under s. 91 to have the sale set aside (i). But whether he proceeds by an application under this rule or by a regular suit, he is entitled to receive back his purchase-money only if the judgment-debtor had no saleable interest at all. If it is found that the judgment-debtor had some interest in the property, however small it may be, the purchaser cannot by *suit*, any more than by *application*, obtain a refund of the purchase-

(e) *Krishna Pershad v. Motichand* (1913) 40 Cal. 633, 40 I. A. 140.
(f) *Sivarama v. Rama* (1885) 8 Mad. 99.
(g) *Kuthamed v. Chaitu* (1886) 9 Mad. 437;
Muhammad v. Bacheho (1905) 27 All. 537.

539.
(h) *Rustomji v. Vinayak* (1910) 35 Bom. 29; *Ram Kumar v. Ram Gour* (1909) 37 Cal. 67.
(i) *Nannu Lal v. Bhagwan Das* (1917) 39 All. 114

O. 21,
rr. 93, 94.

money in proportion to the extent to which the judgment-debtor had no interest. The reason is that in the case of a sale under a decree of the Court, there is no warranty of title either by the decree-holder or by the Court as there is in the case of private sales (j). "The result is that the purchaser must be taken to buy the property with all risks and all defects in the judgment-debtor's title except as aforesaid by [rr. 91 and 93], that in the absence of fraud his only remedy is to recover back his purchase-money where it is found that the judgment-debtor had no saleable interest in the property at all, and that he cannot by suit, any more than by application, obtain a refund in proportion to the extent to which the judgment-debtor had no interest" (k).

94. Where a sale of immoveable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute.

What passes at a Court sale.—As regards private sales, there is in the absence of a contract to the contrary, an implied covenant for title by the vendor as provided by the Transfer of Property Act, 1882, s. 53, sub-s. (2). But as regards sales under a decree of the Court, there is no warranty of title either by the decree-holder or by the Court. Rule 13 of this Order shows that the decree-holder, when applying for execution, has only to specify the judgment-debtor's share or interest in the property "to the best of his belief," and "so far as he has been able to ascertain the same." Rule 66 shows that the proclamation only professes to specify the particulars prescribed by that rule including the property to be sold and the judgment-debtor's interest therein "as fairly and accurately as possible." Hence what passes to a purchaser at a Court-sale is the "right, title and interest" of the judgment-debtor, whatever that interest may be. In other words, a purchaser at a Court sale buys the property with all risks and all defects in the judgment-debtor's title, except where it is found that the judgment-debtor had no saleable interest at all (l). In the latter case, the purchaser may apply to have the sale set aside under r. 91 of this Order, or he may apply for a return of the purchase-money under r. 93. If the purchase-money has been distributed amongst the creditors of the judgment-debtor under s. 73, he may follow the money in their hands (m). But,—and this is an important consequence of the purchaser buying only the right, title and interest of the judgment-debtor,—the sale will not be set aside if the judgment-debtor has even a partial interest in the property, nor will the purchaser be entitled to a refund of the purchase-money to the extent to which the judgment-debtor had no interest, unless the case be one of fraud (n). Upon the same principle a purchaser in execution of a money decree is bound by the estoppel which binds the judgment-debtor whose interest he had purchased (o).

(j) See Transfer of Property Act, s. 53 (2).

(k) *Shanto Chander v. Nain Sukh* (1901) 23 All.

355; *Muhammad v. Bacheo* (1905) 27 All.

537; *Sundara v. Venkata* (1894) 17 Mad.

228; *Dayal v. Amritlal* (1902) 20 Cal.

370.

(l) *Dorab Ally v. Executors of Khajah Mohecodeen*

(1878) 3 Cal. 806, 5 I. A. 116; *Shanto Chan-*

der v. Nain Sukh (1901) 23 All. 355; *Sundara v. Venkata* (1894) 17 Mad. 228; *Nobhagchand v. Bhaichand* (1882) 6 Bom.

193.

(m) *Kishun Lal v. Muhammad* (1891) 13 All. 383.

(n) *Shanto Chander v. Nain Sukh* (1901) 23 All.

355; *Dayal v. Amrita* (1902) 29 Cal. 370;

Administrator-General v. Aghore (1902) 29

Cal. 420.

(o) *Prayag Raj v. Sidhu Prasad* (1908) 33 Cal. 877;

Contrast Ganesh v. Purshottam (1909) 37

Bom. 311.

It has been stated above that what passes to a purchaser at a Court-sale in execution of a money decree is the "right, title and interest" of the judgment-debtor in the property sold. To determine the nature and extent of the judgment-debtor's right, title and interest in the property sold, the test is as stated by Lord Watson in the course of the argument in *Peltachi Chettiar v. Chinnahambiar* (p), what did the Court intend to sell, and what did the purchaser understand that he bought? These are questions of fact, or rather of mixed law and fact, and must be determined according to the evidence in the particular case (q).

O. 21,
rr. 94-96.

Variance between proclamation of sale and sale-certificate.—It is provided by O. 21. r. 66, that where property is ordered to be sold in execution of a decree, the proclamation of sale should "specify as fairly and accurately as possible the property to be sold." By the present rule it is provided that where property is sold, and the sale becomes absolute, the Court shall grant a certificate "specifying the property sold." It sometimes happens that the property as described in the certificate of sale is different from that described in the proclamation of sale. In such a case the description of the property in the proclamation of sale is *conclusively* as to what was the subject-matter of the sale. As stated by their Lordships of the Privy Council in *Thaku Barmha v. Jiban Ram* (r), "that which is sold in a judicial sale of this kind can be nothing but the property attached, and that property is *conclusively* described in and by the schedule to which the attachment refers," that is, the schedule of attached property annexed to the proclamation of sale.

95. Where the immoveable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser, or any person whom he may appoint to receive delivery on his behalf, in possession of the property, and, if need be, by removing any person who refuses to vacate the same.

Delivery of property in
occupancy of judgment-
debtor.

Delivery of possession to purchaser.—The possession contemplated by this rule is legal or actual possession. See notes to r. 35 of this Order.

96. Where the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery

Delivery of property in
occupancy of tenant.

p) (1887) 10 Mad. 241, 248, 14 I. A. 84. See also *Sunbhunath v. Golap Singh* (1887) 14 Cal. 572, 579, 14 I. A. 77; *Mahabir Pershad v. Moheshwar Nath* (1890) 17 Cal. 584, 589-89, 17 I. A. 11.

q) *Abdul Aziz v. Appayasami* (1904) 27 Mad. 131, 31 I. A. 1; *Tara Lal v. Sarabai Singh* (1900) 27 Cal. 407, 27 I. A. 31.
r) (1913) 41 Cal. 500, 41 I. A. 38.

O. 21, to be made by affixing a copy of the certificate of sale in some
rr. 96-99. conspicuous place on the property, and proclaiming to the
occupant by beat of drum or other customary mode, at some
convenient place, that the interest of the judgment-debtor
has been transferred to the purchaser.

Delivery of possession to purchaser.—The possession contemplated by
this rule is *symbolical* possession. See notes to r. 35 of this Order.

*Resistance to delivery of possession to decree-holder or
Purchaser.*

97. (1) Where the holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

Regular suit.—The decree-holder may either resort to the summary remedy provided by this rule or he may bring a regular suit. Failure on the part of the decree-holder to avail himself of the remedy under this rule does not deprive him of the right of bringing a regular suit against the party obstructing execution of the decree (s).

98. Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may extend to thirty days.

99. Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession

Resistance or obstruction
by bonâ fide claimant.

of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application. O. 21,
r. 99-10

Any person other than judgment-debtor claiming to be in possession of the property.—The word “possession” as used in this rule is not limited to actual *physical* possession. It includes also *constructive* possession, such as possession by a tenant. Thus if the property is in the actual possession of a tenant, and resistance or obstruction is offered by the landlord, the application must be dismissed under this rule, for the landlord is in *constructive* possession of the property by his tenant (i).

100. (1) Where any person other than the judgment-debtor is dispossessed of immoveable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof he may make an application to the Court complaining of such dispossession.

Dispossession by decree-holder or purchaser.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

“Is dispossessed.”—Where mere symbolical possession is delivered to the decree-holder or purchaser under r. 96, the person in possession cannot be said to be “dispossessed” within the meaning of this rule so as to entitle him to apply under this rule (v). It is the delivery of actual possession alone (r. 95) that can constitute dispossession within the meaning of this rule. A person who is in possession through his tenant will be said to be “dispossessed” within the meaning of this rule, if the tenant is ousted from the property by the delivery of actual possession to the decree-holder or purchaser (v).

Dispossession under order of Collector.—When a person has been dispossessed under an order made by the Collector to whom execution proceedings are transferred, he should apply to the Collector, and not to the Court, complaining of such dispossession. This rule has no application when execution has been transferred to the Collector (w).

101. Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property.

Bona fide claimant to be restored to possession.

(i) See *Mancharam v. Fakirchand* (1901) 25 Bom. 478. | (v) *Brajaabala v. Gurudas* (1906) 33 Cal. 487.
(w) *Ibrahim v. Ramjadu* (1903) 30 Cal. 710. | (w) *Ragho v. Hanmati* (1913) 37 Bom. 488.

O. 21,
r.102,103.

102. Nothing in rules 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immoveable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to dispossession of any such person.

Rules not applicable to
transference *litis pendente*.

103. Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property; but subject to the result of such suit, if any, the order shall be conclusive.

Orders conclusive subject
to regular suit.

Suit to establish right to present possession.—The suit must be brought within one year from the date of the order: Limitation Act, 1908, sch. I, art. 11A. If no suit is brought within the aforesaid period, the order will be conclusive.

ORDER XXII.

Death, Marriage and Insolvency of Parties.

O. 22, r.1.

1. The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

No abatement by party's
death, if right to sue sur-
vives.

In what cases the right to sue survives and in what cases it does not.—To answer this question, we must turn to the provisions of—

I. The Indian Contract Act 9 of 1872, s. 37, and

II. The Indian Succession Act 10 of 1865, s. 268, in cases to which the Succession Act applies, and the Probate and Administration Act 5 of 1881, s. 89, in cases to which the Probate Act applies [see notes to O. 7, r. 4]. Sec. 89 of the Probate Act is a reproduction of s. 268 of the Succession Act.

I. *Contract Act*, s. 37.—Section 37 of the Contract Act runs as follows: "Promises bind the representatives of the promisors in case of the death of such promisors before performance *unless a contrary intention appears from the contract*." Expanding the italicized words, we may say that contracts involving the exercise of special skill or involving special personal confidence are not binding on the representatives of the promisors. *A* promises to paint a picture for *B* by a certain day at a certain price. *A* dies before the day. The contract cannot be enforced either by *A*'s representatives against *B* or by *B* against *A*'s representatives. The reason is that the right to sue does not survive to or against the representatives of *A*.

O. 22
rr. 1,

II. *Succession Act*, s. 268 and *Probate Act*, s. 89.—The following are the provisions of the Indian Succession Act, s. 268, and the Probate and Administration Act, s. 89 : “All demands whatsoever and all rights to prosecute or defend any action or special proceeding, existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators, except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory.”

Analysing the above section, we may say that the right to sue does not survive in the following cases :—

(i) Suits for defamation, assault or other personal injuries not causing the death of the party. [Where death is caused by a personal injury, the legal representative of the deceased may sue the wrong-doer for damages under Act 13 of 1855.]

(ii) Cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory.

Illustrations.

of cl. (i).—1. A sues B for defamation. A dies before decree. The right to sue does not survive, and the suit abates. That is to say, A's representative is not entitled to prosecute the suit.

2. A sues B for damages for assault. A dies before decree. [It is assumed that the death has not been caused by the assault.] The right to sue does not survive and the suit abates.

of cl. (ii).—3. A sues B for divorce. A dies. The cause of action does not survive to his representative : *Stanhope v. Stanhope* (1886) 11 P. D. 103.

4. A sues B to recover possession of his minor daughter illegally detained by B. B dies before decree. The cause of action does not survive against B's representative and the suit abates : *Sharifa v. Munekhan* (1901) 25 Bom. 574.

5. A sues B to establish his right to the office of *Mahant*. A dies before decree. The suit abates, for the right claimed is a personal right to an office : *Sham Chand v. Bhayaram* (1895) 22 Cal. 92.

6. A sues B for an injunction to restrain him from preventing A from enjoying the honour of standing at a particular place in a temple. B dies pending the suit. The suit abates : *Josiam v. Swami* (1910) 34 Mad. 76.

In cases other than those comprised in clauses (i) and (ii), the right to sue does survive. The right to sue for damages for breach of contract, the right to sue on a promissory note, the right to sue for a debt, the right to sue on a mortgage, the right to sue for wrong done to property, are all instances of right that are not extinguished on the death of the plaintiff or defendant. In all these cases the suit does not abate on the death of the plaintiff or defendant.

✓ 2. Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone,

Procedure where one of several plaintiffs or defendants dies and right to sue survives.

- o. 22, the Court shall cause an entry to that effect to be made on
 rr. 2, 3. the record, and the suit shall proceed at the instance of
 the surviving plaintiff or plaintiffs, or against the surviving
 defendant or defendants.

Cases where right to sue survives to surviving plaintiff alone.—

Where a suit is brought by several joint-owners of immoveable property for damages for trespass, and one of the plaintiffs dies during the pendency of the suit, the suit may be continued by the surviving joint-owners, and the legal representative of the deceased joint-owner is not a necessary party to the suit (x).

Cases where right to sue survives against surviving defendants alone.—

Where the defendants are executors or trustees, and are sued in their representative capacity, if any one of them dies before decree, the suit may be continued against the surviving executors or trustees, and the legal representative of the deceased executor or trustee is not to be added as a defendant.

3. (1) Where one of two or more plaintiffs dies and
 the right to sue does not survive to the
 surviving plaintiff or plaintiffs alone, or
 a sole plaintiff or sole surviving plaintiff
 dies and the right to sue survives, the
 Court, on an application made in that behalf, shall cause the
 legal representative of the deceased plaintiff to be made a
 party and shall proceed with the suit.

Procedure in case of death
 of one of several plaintiffs or
 of sole plaintiff.

- (2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

“Dies.”—The word “dies” in this rule refers to death *before* decree. This rule, therefore, does not apply to cases in which a plaintiff dies after decree and before appeal (y).

The suit shall abate “so far as the deceased plaintiff is concerned.”—

Where one of two or more plaintiffs dies and the right to sue *survives* to the surviving plaintiff or plaintiffs alone, as where the right is a *joint* right, the surviving plaintiff or plaintiffs may proceed with the suit. This case has been dealt with in r. 2 above. The present rule provides *inter alia* that where one of two or more plaintiffs dies and the right to sue *does not survive* to the surviving plaintiff or plaintiffs alone, the legal representative of the deceased plaintiff ought to be made a party to the suit. For this purpose an application should be made to the Court, and such application must be made within 6 months from the date of the death of the deceased plaintiff. Sub-rule (2) pro-

(x) See *Chandramohan v. Biswambhar* (1863) 1 | (y) *Ramanada v. Minatchi* (1881) 3 Mad. 236.
 Beng. L. R. O. C. 42.

vides that where no such application is made, the suit shall abate *so far as the deceased plaintiff is concerned*. The words italicized above mean that the suit shall *primarily* abate so far as the deceased plaintiff is concerned, but they do not mean that the suit shall in no case abate *as a whole*. If the suit is of such a nature that it can proceed in the absence of the legal representative of the deceased plaintiff, it will abate so far only as the deceased plaintiff is concerned. But if it is of such a character that it cannot proceed in the absence of the legal representative, it will abate as a whole.

O. 22,
rr. 3, 4.

Legal representative.—See s. 2, cl. (ii), and the notes on that clause.

4. (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

Procedure in case of death
of one or several defendants
or of sole defendant.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law, no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

This rule applies even though a preliminary decree has been passed.—A sues B, C and D for dissolution of partnership and for accounts, and a preliminary decree is passed in the suit. B dies after the date of the preliminary decree. Some two years after his death, A applies to have the name of his heir brought upon the record. The application is barred by limitation, and the suit abates as against B (2).

The suit shall abate “as against the deceased defendant.”—Where one of two or more defendants dies, and the right to sue *survives* against the surviving defendant or defendants *alone*, as where the liability is a *joint* one, the suit should be proceeded with as against the surviving defendant or defendants. This case has been dealt with in r. 2 above. The present rule provides *inter alia* that where one of two or more defendants dies, and the right to sue *does not survive* against the surviving defendant or defendants *alone*, as in a suit for partition or a suit for partnership accounts, the legal representative of the deceased defendant ought to be made a party to the suit. For this purpose an application should be made to the Court, and such application must be made within six months from the date of the death of the deceased defendant. Sub-rule (3) provides that where no such application is made, the suit shall abate *as against the deceased defendant*. The words “as against the deceased defendant” are new. These words mean that where no application is made to bring the legal representative on the record within the time limited by law, the suit abates *primarily* as against the deceased

- O. 22, defendant only. But where the facts of a case are such that the suit cannot proceed
rr. 4-7. in the absence of the legal representative, the suit will abate as a whole.

Illustrations.

(1) *A* mortgages certain property to *B*. *C* stands surety for repayment of the mortgage-debt. *B* sues *A* and *C*, praying as against *A* for a sale of the mortgaged property, and as against *C* for a decree for the payment of the mortgage-debt. *C* dies pending the suit. No application is made by *B* to bring on the record the legal representative of *C* within 6 months from the date of *C*'s death. The suit abates as against *C* only, and not as a whole : *Mehdi Husain v. Sugra Begam* (1902) 23 All. 206. [In this case it is clear that *B* could have abandoned his claim against *C*, and sued *A* alone on the mortgage].

(2) *A* sues his partners *B*, *C*, *D* and *F* for dissolution and for accounts of the partnership. A decree is passed in the suit by which it is ordered that a sum of Rs. 9,000 should be contributed by *A*, *B* and *C*, and that out of that sum Rs. 1,740 should be paid to *D* and the rest to *F*. *A* appeals from the decree making *B*, *C*, *D*, and *F* party respondents. *B* and *C* also appeal from the decree making *A*, *D* and *F* party respondents. Pending the appeal *D* dies. No application is made by the appellants in either appeal to bring on the record the legal representative of *D* within the period of limitation. The appeals abate as a whole, for it is not a case in which the appeals could proceed in the absence of the legal representative of *D*, as the suit is one for partnership accounts : *Raj Chunder v. Gunga Das* (1904) 31 Cal. 487, 31 L. A. 71.

5. Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court.
- Determination of question as to legal representative.

6. Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.
- No abatement by reason of death after hearing.

7. (1) The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may be executed against her alone.
- Suit not abated by marriage of female party.

(2) Where the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

O. 22,
rr. 7, 8.

Husband's liability for wife's debts.—Where a wife is living with her husband and managing the household affairs, and in the course of such management she buys necessities, the presumption is that the wife had authority to pledge her husband's credit, and the husband is liable for the debt contracted by her. But this presumption may be rebutted if the husband proves that he supplied his wife from time to time with an adequate allowance of ready money (a).

8. (1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct.

When plaintiff's insolvency bars suit

(2) Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.

Procedure where assignee fails to continue suit or give security.

This rule applies to the case of a plaintiff insolvent.—This rule lays down the procedure to be followed where a plaintiff becomes insolvent. As to the case of the insolvency of a defendant in a presidency-town it is now provided by sec. 18 of the Presidency Town Insolvency Act, 1909, that where a defendant to a suit has been adjudged an insolvent, the Court may, at any time after the making of the order of adjudication, stay any suit or other proceeding pending against the insolvent before any Judge or Judges of the Court or in any other Court subject to the superintendence of the Court. It is further provided by the same section that any Court in which proceedings are pending against a debtor may, on proof that an order of adjudication has been made against him under the Act, either stay the proceedings or allow them to continue on such terms as it may think just. As to cases governed by the Provincial Insolvency Act, 1907, see sec. 16, sub-sec. (2).

(a) *Morrell Brothers & Co. v. Earl of Westmorland* 1903] 1 K. B. 64, C. A.

O. 22,
rr. 9, 10.

9. (1) ^{Effect of abatement or dismissal.} Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of section 5 of the Indian Limitation Act, 1877, shall apply to applications under sub-rule (2).

Effect of abatement or dismissal.—Compare O. 9, rr. 8 and 9.

Application to set aside abatement or dismissal.—The following persons may apply under sub-rule (2), namely, (1) *the plaintiff*, where a suit has abated under r. 4, sub-r. (3), (2) *the legal representative of a deceased plaintiff*, where a suit has abated under r. 3, sub-r. (2), and (3) *the assignee of an insolvent plaintiff*, where a suit is dismissed under r. 8, sub-r. (2).

Cause of action of original and revived suit must be the same.—No fresh cause of action can be imported into the revived suit, for the proceedings in the revived suit are a continuation of the proceedings in the original suit (*b*).

10. (1) ^{Procedure in case of assignment before final order in suit} In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

Other cases of assignment, creation or devolution of interest.—The preceding rules of this Order provided for some cases of assignment, creation and devolution of interest. Rule 8 provided for the case of assignment on the insolvency of a plaintiff, rule 7 for the case of creation of an interest to a husband on marriage, and rules 2, 3 and 4 for the case of devolution of interest on the death of a party to a suit. The present rule provides for cases of assignment, creation and devolution of interest *other than* those mentioned above (*c*).

Assignment of interest.—The word “interest” in this rule means interest in the property, the subject-matter of the suit (*d*).

(b) *Sham Chand v. Bhayram* (1895) 22 Cal. 92.

(c) *Bhagwan Das v. Nilkantha* (1904) 9 C. W. N. 171, at p. 173.

(d) *Harish Chandra v. Chandpore Co., Ltd.* (1903) 30 Cal. 901.

*Illustrations.*O. 22,
rr. 10, 11.

1. *A* sues *B* for recovery of possession of certain property. Pending the suit, *A* sells his interest in the property to *C*. *C* may apply under this rule to have his name substituted as plaintiff in *A*'s place.

2. *A* sues the firm of *BC* to recover Rs. 5,000. Pending the suit, the firm of *BC* transfers all its assets and liabilities to the firm of *XY*. Thereupon *A* applies to the Court under this rule to have the firm of *XY* joined as a party defendant. The application should be refused, for the assignment cannot be said in any sense to be an assignment of the defendant's interest in the *subject-matter of the suit*. The word "interest" in this rule means interest in the property, the subject matter of the suit: *Harish Chandra v. Chandpur Co. Ltd.* (1903) 30 Cal. 961. [Here the subject-matter of the suit is the amount claimed by *A*, namely, Rs. 5,000.]

During the pendency of a suit.—These words mean "before a final decree has been passed in the suit." See the marginal note to the present rule.

11. In the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal.

Application of Order to
appeals.

12. Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order.

Application of Order to
proceedings.

ORDER XXIII.

Withdrawal and Adjustment of Suits.

1. (1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

Withdrawal of suit or
abandonment of part of
claim.

O. 23, r. 1.

(2) Where the Court is satisfied—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

23. r. 1. it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.

Sub-rule (1).—This sub-rule is new. It does not create any new right. It merely affirms the right of a plaintiff to withdraw a suit in whole or in part against all or any of the defendants, and is added here to make the rule a complete enunciation of the law relating to the withdrawal of and from suits. Sub-rule (1) contemplates a withdrawal of the suit, sub-rule (2) a withdrawal from the suit. If a party desires to withdraw from the suit with liberty to institute a fresh suit, he must apply to the Court under sub-rule (2) to permit him so to withdraw. If he does not desire to have that liberty, then he can withdraw the suit of his own motion under sub-rule (1), and no order of the Court is necessary (e).

“Formal defect”—“Sufficient grounds.”—A suit may be defective in form or it may be defective on the merits. Leave may be granted under this rule when the suit must fail by reason of some formal defect, but not when it must fail on the merits unless there are sufficient grounds within the meaning of sub-rule (2), cl. (b) (f). Thus a misjoinder of parties or of causes of action is a formal defect; so is the improper valuation of the subject-matter of a suit. In such cases, leave may be granted to the plaintiff to withdraw from the suit with liberty to institute a fresh suit (g). Similarly, leave may be granted where a material document is not properly stamped or is not registered (h), for these are in the nature of formal defects. But the Court has no power under this rule to grant permission to the plaintiff to withdraw from the suit with liberty to institute a fresh suit in a case where issues have been joined and the plaintiff fails to produce evidence in support of the issues: the reason is that the case is one in which the suit must fail not by reason of some formal defect, but on the merits, and the apprehension of failure in the suit cannot be said to constitute a “sufficient ground” for allowing the plaintiff to institute a fresh suit (i). “It is impossible,” said Scott, C.J., in a recent case, “to lay down any exhaustive definition of what are sufficient grounds within the meaning of [this rule], but I think that the Court should not allow a suit to be withdrawn after the parties are ready for trial if such withdrawal may operate to the prejudice of the defendant (j). In fact, clauses (a) and (b) of sub-r. (2) are to be read together, and

(e) *Mahant v. Purshovandus* (1908) 32 Bom. 345 347.

(f) *Zakurunnissa v. Khuda* (1881) 3 All. 528.

(g) *Watson v. Collector of Rajshahye* (1860) 13 M. I. A. 160; *Ganeshi v. Khairati* (1894) 16 All. 270.

(h) *Misser Debee v. Buldeo* (1873) 5 All. H. C. 116.

(i) *Watson v. Collector of Rajshahye* (1869) 13

M. I. A. 160; *Sukh Lal v. Bhikhi* (1889) 11

All. 187.

(j) *Mahipati v. Nathu* (1909) 33 Bom. 722, 726.

the intention is that a ground included in clause (b) must be of the same nature as the ground specified in clause (a), that is to say, it must be something of the same nature as *formal defect* (k). Thus no permission should be granted under sub-rule (2) where after the case for both the plaintiff and the defendant has been closed, the Court gives time to the plaintiff to adduce documents to counteract the effect of documents produced by the defendant, and the plaintiff fails to adduce the documents on the appointed day (l).

O. 23,
rr 1-3.

Withdrawing without permission.—If a plaintiff withdraws from a suit without the permission of the Court, he is precluded from instituting a fresh suit in respect of the same subject-matter (m). But if the subject-matter of the second suit is different from that of the first (n), or if the second suit is not against the same parties (o), the second suit is not barred.

Defendants in fresh suit.—Where a suit has abated as against one of several defendants, and it is then withdrawn with permission to bring a fresh suit, such permission does not entitle the plaintiff to join the legal representatives of the deceased defendant as party defendants to the new suit, the suit having abated as against him (p).

Whether an Appellate Court has power to allow the withdrawal of a suit with liberty to bring a fresh suit.—It has been held by the High Courts of Allahabad (q) and Madras (r) that it has. On the other hand, it has been held by the High Court of Bombay (s) that it has not. The reason given by the latter Court is that this rule applies only to *pending* suits, and not to suits that have already been disposed of by the Court of first instance.

* 2. In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

Limitation law not affected by first suit.

Limitation.—The fresh suit must be instituted within the period of limitation. It will not lie after the period of limitation even though the suit that was permitted to be withdrawn was within the period of limitation (t).

3. Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise, or satisfaction to be recorded, and shall pass a decree in accordance therewith, so far as it relates to the suit.

Compromise of suit.

(k) *Kali Prasanna v. Panchanam* (1917) 44 Cal. 367.

(l) *Bai Kashibai v. Shitappa* (1913) 37 Bom. 182.

(m) *Achuta v. Achutan* (1898) 21 Mad. 35.

(n) *Kamini v. Ram Nath* (1894) 21 Cal. 265.

(o) *Mukhoda v. Ramchurn* (1882) 8 Cal. 871.

(p) *Seshama v. Suryanarayana* (1913) 38 Mad. 643.

(q) *Afzal v. Aktari* (1915) 37 All. 326.

(r) *Kamayya v. Papayya* (1917) 40 Mad. 259.

[F. B. I.]

(s) *Eknath v. Ranaji* (1911) 35 Bom. 261.

(t) *Varalal v. Shomechwar* (1905) 29 Bom. 219.

1. 23, r. 3. Scope of the rule.—The agreement, compromise or satisfaction contemplated by this rule may (1) relate *wholly* to the suit, or (2) it may relate only to a *part* thereof, or (3) it may also comprise *matters that do not relate to the suit*. Where the agreement *wholly* relates to the suit, the Court should, on being invited by the parties, record the agreement, and pass a decree in accordance with the agreement, and the suit stops there. Where the agreement relates to a *part only* of the suit, the Court should, on the application of the parties, pass a decree in accordance with the agreement, and the suit may be proceeded with as regards the remaining matters in dispute. Where the agreement, besides relating to the suit or a part thereof, also comprises matters that do not relate to the suit, the decree should comprise only such terms of the agreement as relate to the suit, but not the rest. Of course, if the agreement in any one of the three cases is not lawful, the Court is not bound to record it.

Where a compromise set up by one party is denied by the other.—Suppose that a party to a suit, alleging that the suit has been adjusted by a lawful agreement, applies to the Court to record the agreement and to pass a decree in accordance therewith. Suppose, further, that the opposite party to the suit denies that there was any such agreement as alleged, or, while admitting that there was such an agreement, alleges that he wishes to recede from it. Has the Court the power, if the fact of the agreement is denied, to determine whether as a fact the alleged agreement adjusting the suit has been made, and to pass a decree if it finds as a fact that the alleged agreement was made? The words "*where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part*" clearly show that the Court has power under this rule, where an agreement or compromise is denied, to decide whether, as a fact, the alleged agreement or compromise was made, and, if it is satisfied that it was made, to record it.

Procedure to be followed under this rule.—Where the Court is satisfied that a suit has been compromised, it is the duty of the Court under this rule first to make an *order* recording the compromise, and then to pass a *decree* in accordance with the compromise. The passing of the *order* is not a mere matter of form: it is a matter of substance. The reason is that an appeal is allowed only from the *order* recording the compromise [see O. 43, r. 1, cl. (m)] but no appeal is allowed from the *decree* which follows the *order* [see s. 96 (3)] (u).

Court cannot refuse to record a compromise except where it is unlawful.—Where both parties to a suit apply to the Court under this rule to pass a decree in accordance with the terms of a compromise, the Court has no power to refuse to pass the decree, merely because in its view the compromise is too favourable to one of the parties (v). But if the agreement or compromise is unlawful, as where it is opposed to public policy, the Court should refuse to pass a decree on the compromise even though both the parties consent thereto (w).

It has been recently held by a Full Bench of the Bombay High Court that a compromise in a suit which comes under the Dekkhan Agriculturists' Relief Act (XVII of 1879) is not bad in law because it is made without compliance with the provisions of sec. 15B of that Act (x).

Where the decree comprises matters that do not relate to the suit.—The decree to be passed under this rule must be confined to matters *that relate to*

(u) *Paban v. Bhupendra Nath* (1916) 43 Cal. 85.

(v) *Motiram v. Yesu* (1898) 22 Bom. 238.

(w) *Sundarambal v. Yogachanagurukhal* (1914) 38

Mad. 850.

(x) *Shivayyagappa v. Govindappa* (1913) 37

Bom. 614.

the suit. This does not mean that the decree to be passed in accordance with a compromise must be restricted to the *reliefs* claimed in the plaint. "All terms which form the consideration for the adjustment of the matters in dispute, whether they form the subject-matter of the suit or not, become related to the suit, and can be embodied in the decree." Thus, where *A* sued *B* on a promissory note, and a compromise was arrived at between the parties whereby *B* agreed to pay the amount of the note by instalments, and the amount was also made a charge on certain immoveable property of *B*, it was held that there was nothing in the present rule to restrict the Court from making the amount a charge on *B*'s property, even though the relief claimed was for a *money-decree* only. The charge, though not claimed as a relief, *related* to the suit (*y*). It formed the consideration for the time allowed for payment of the sum decreed by instalments, and thus constituted an integral and necessary part of the adjustment of the claim in the suit (*z*).

O. 23,
rr. 3, 4.

Award.—*A* institutes a suit against *B*. Subsequently *A* and *B* agree to refer the matters in dispute in the suit to arbitration. No order of reference is obtained from the Court, in other words, the arbitration is one *without the intervention of the Court*. The parties then proceed with the arbitration, and an award is made. Do the submission and award constitute an "adjustment of the suit by agreement" within the meaning of the present rule so as to entitle either party to the suit to ask the Court to record it and pass a decree in accordance with it, or is the case governed by Schedule II relating to arbitration? On this point there is a conflict of decisions in Bombay. On the one hand it has been held that the procedure to be followed is that prescribed in the present section (*a*). On the other hand, it has been held, having regard to the provisions of s. 89, that the procedure to be followed is that prescribed in paras. 20 and 21 of Schedule II below (*b*). The Calcutta (*c*) and Madras (*d*) High Courts are inclined to the latter view.

4. Nothing in this Order shall apply to any proceedings in execution of a decree or order.

Proceedings in execution of decrees not affected.

Proceedings in execution.—This rule provides that the provisions of rr. 1 and 3 shall not apply to execution proceedings. An application for execution of a decree is a proceeding in execution; the Court, therefore, has no power to allow the applicant to withdraw the application under r. 1, sub-r. (2) above with permission to make a fresh application (*e*).

An enquiry before the Commissioner pursuant to a preliminary decree is a proceeding in execution. A compromise, therefore, of *matters before the Commissioner*, is a compromise of a proceeding in execution, and it cannot therefore be recorded under r. 3 above. But a compromise of *the whole suit*, though it be pending the enquiry before the Commissioner is not a compromise of merely a proceeding in execution. Such a compromise may therefore be recorded under r. 3 above (*f*).

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| <p>(y) <i>Kuruvetappa v. Sivasappa</i> (1907) 30 Mad. 478 ;
 <i>Sabapathy v. Yammahalinga</i> (1914) 38 Mad. 859.
 (z) <i>Govinda Chandra v. Dwarka Nath</i> (1908) 35 Cal. 837.
 (a) <i>Harakhbai v. Jammabai</i> (1913) 37 Bom. 639.</p> | <p>(b) <i>Shavakshaw v. Tyab</i> (1916) 40 Bom. 386.
 (c) <i>Tincowry v. Fakirchand</i> (1908) 30 Cal. 218.
 (d) <i>Venkatachala v. Rangiah</i> (1911) 36 Mad. 353.
 (e) <i>Mata v. Beni</i> (1914) 36 All. 172.
 (f) <i>Fragdas v. Girdhardas</i> (1902) 26 Bam. 70, 82.</p> |
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ORDER XXIV.

Payment into Court.

- O. 24,
rr. 1, 2.
1. The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.
- Deposit by defendant of amount in satisfaction of claim.

Payment into Court with denial of liability.—There is no provision in this rule enabling a defendant to pay money into Court with a defence denying liability.

Suit to recover debt or damages.—This order applies only to suits for “debt or damages”, and not to suits of any other kind. Where a suit is instituted against a defendant to recover a debt or damages from him, he may pay into Court such amount as he considers a satisfaction in full of the plaintiff’s claim. By such payment into Court, the defendant may derive two advantages, one in respect of interest, for which see r. 3 below, and the other in respect of costs, for which see r. 4 below and illustrations thereto.

A suit for an injunction to restrain a defendant from building so as to interfere with the plaintiff’s light and air, but including *no claim for damages*, is not a suit for “debt or damages” within the meaning of this rule. In dealing with such a suit the Court has, no doubt, a discretion under the Specific Relief Act 1 of 1877 to award damages in lieu of an injunction. This circumstance, however, does not make the suit one for “damages” within the meaning of this rule (g).

Suit for accounts.—This rule does not apply to a suit for accounts (h).

Suit to recover debt or damages together with other relief.—This rule applies to suits to recover debt or damages, though there may be other reliefs claimed in the suit. *e.g.*, injunction (i).

2. Notice of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application.
- Notice of deposit.

“Unless the Court otherwise directs.”—These words show that the Court has the discretion to refuse to allow monies to be paid out, but that discretion is to be exercised reasonably. Thus where the money sued for and paid into Court is due on a promissory note, it would be unreasonable in the absence of special circumstances not to allow the plaintiff to take the money out (j).

(g) *Laxman v. Moroba* (1897) 21 Bom. 502.

(h) *Nichols v. Evans* (1883) 22 C. D. 611.

(i) See *Moon v. Dickinson* (1890) 63 L. T. 371.

(j) *Dwarkan Dass v. Girish Chunder* (1899) 26 Cal. 766.

3. No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof. O. 24,
rr. 3, 4.

4. (1) Where the plaintiff accepts such amount as satisfaction in part only of his claim, he may prosecute his suit for the balance; and, if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim.

(2) Where the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed, and the Court shall pronounce judgment accordingly: and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.

Illustrations.

(a) *A* owes *B* Rs. 100. *B* sues *A* for the amount, having made no demand for payment, and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, *A* pays the money into Court. *B* accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part.

(b) *B* sues *A* under the circumstances mentioned in illustration (a). On the plaint being filed, *A* disputes the claim. Afterwards *A* pays the money into Court. *B* accepts it in full satisfaction of his claim. The Court should also give *B* his costs of suit, *A*'s conduct having shown that the litigation was necessary.

(c) *A* owes *B* Rs. 100, and is willing to pay him that sum without suit. *B* claims Rs. 150 and sues *A* for the amount. On the plaint being filed *A* pays Rs. 100 into Court and disputes only his liability to pay the remaining Rs. 50. *B* accepts the Rs. 100 in full satisfaction of his claim. The Court should order him to pay *A*'s costs.

ORDER XXV.

Security for Costs.

1. (1) Where, at any stage of a suit it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are, residing out of British India, O. 25, r. 1,

When security for costs may be required from plaintiff.

O. 25, r. 1. and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immoveable property within British India other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub-rule (1).

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India.

Object of the rule.—The object of the rule is to provide for the protection of defendants in certain cases where, in the event of success, they may have difficulty in realizing their costs from the plaintiff (*k*).

Application of the rule.—Security for the costs of a defendant may be required from a plaintiff in the following two cases:—

- I. (a) Where the plaintiff resides out of British India, or where there are two or more plaintiffs, all the plaintiffs reside out of British India; and
- (b) where none of the plaintiffs has sufficient immoveable property within British India other than the property in suit.
- II. (a) Where the plaintiff is a woman;
- (b) where her suit is for the payment of money; and
- (c) she does not possess sufficient immoveable property within British India.

Discretion of Court in requiring security for costs from non-resident plaintiff.—The word “may” implies discretion. In the exercise of this discretion the Court will not order security for costs from a plaintiff residing out of British India in cases in which he cannot be rendered liable for the defendant’s costs, e.g., an administration suit by the plaintiff as a creditor or a legatee in which the plaintiff’s claim is admitted, or a suit on a mortgage or a promissory note where there is no defence. In such cases no security for costs will be ordered *even though* the plaintiff resides out of British India, and has not sufficient immoveable property within British India, not even though the plaintiff be a woman (*l*).

(*k*) *Frenchand*, in the goods of (1894) 21 Cal. 832, at p. 836. | (*l*) *Frenchand*, in the goods of (1894) 21 Cal. 832, 836.

British India.—The Cantonment of Wadhwan in Kathiawar is not within British India (m), nor is the Cantonment of Secunderabad (n); nor is Rajkot Civil Station (o). See notes to s. 1, "British India" **O. 25, rr. 1, 2.**

Where the plaintiff is a woman.—The necessity for the provisions of sub-r. (3) arises from the provisions of s. 76, by which it is enacted that no woman can be arrested or detained in the civil prison in execution of a decree for the payment of money (p). But the Court has a discretion in the matter, and in the exercise of its discretion, it will not as a general rule require security for costs from a woman-plaintiff, if the result of such an order will be practically to defeat the suit where it has been instituted *bona fide* and has become almost ripe for hearing (q).

Other cases in which security for costs may be required under the Code.—See O. 22, r. 8 [plaintiff's insolvency], O. 37, r. 4 [summary suit on negotiable instruments], O. 41, r. 5 [security on stay of execution], O. 41, r. 6 [security where execution is granted of a decree appealed from], O. 41, r. 10 [security from appellant], and O. 45, r. 7 [security on grant of certificate of leave to appeal to the Privy Council].

2. (1) In the event of such security not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.

Effect of ruling to furnish security

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(3) The dismissal shall not be set aside unless notice of such application has been served on the defendant.

ORDER XXVI.

Commissions.

Commissions to examine witnesses.

1. Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted

Cases in which Court may issue commission to examine witness.

(m) *Emperor v. Chumantal* (1912) 14 Bom. L. R. 876.

(n) *Hossein Ali v. Abdul Ali* (1894) 21 Cal. 177.

(o) *Queen Empress v. Abdul* (1880) 10 Bom.

186.

(p) *Premchand, in the goods of* (1894) 21 Cal. 832, 836.

(q) *Namubai v. Daji Gavind* (1910) 35 Bom. 421.

- O. 26. under this Code from attending the Court or who is from
rr. 1-4. sickness or infirmity unable to attend it.

Power of Court to issue commissions.—See s. 75 above.

Cases in which commissions may be issued.—A commission can only be issued in the cases specified in this rule and rules 4 and 5 below, and in no other case. Therefore, a commission should not be issued for the examination of the head of a *mull*, though it may be alleged by him that it is derogatory to a person in his position to appear personally in Court as a witness (r).

Persons exempted from attending the Court.—Amongst those so exempted are women who, according to the custom and manners of the country, ought not to be compelled to appear in public (see s. 132). Such women ought to be examined on commission, even though they may have appeared in public before (s) and though an allegation of immorality is made against them (t).

2. An order for the issue of a commission for the examination of a witness may be made by the Court either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined.

3. A commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute.

- Persons for whose examination commission may issue. 4. (1) Any Court may in any suit issue a commission for the examination of—

- (a) any person resident beyond the local limits of its jurisdiction ;
- (b) any person who is about to leave such limits before the date on which he is required to be examined in Court ; and
- (c) any civil or military officer of the Government who cannot, in the opinion of the Court, attend without detriment to the public service.

- (2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction

(r) *Yeerabadram v. Nataraju* (1905) 28 Mad. 28. (t) *Binodini v. Kala Chand* (1901) 5 Cal. W. N. 650.
(s) *Mohes Chunder v. Manick Lal* (1899) 20 Cal. cccxxii.

such person resides, or to any pleader or other person whom the Court issuing the commission may appoint. O. 26,
rr. 4-7.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court.

Commission for the examination of witnesses.—A commission will be granted almost as a matter of course for the examination of a material witness (*u*).

Plaintiff asking for a commission to examine himself.—Suppose a plaintiff, residing in Delhi, institutes a suit in Bombay, and then applies to the Bombay Court for the issue of a commission for his examination in Delhi. In such a case the Court will refuse the application unless a very strong case is made out, because the Bombay tribunal is chosen by the plaintiff himself (*v*).

Defendant asking for a commission to examine himself.—The case, however, is different, where the application is made by a defendant, and especially a defendant lawfully resident out of the jurisdiction, according to the ordinary course of his life and business. The Court will not regard the case of a defendant with the same strictness as the case of a plaintiff (*w*).

7 **5.** Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request.

Commission or request to
examine witness not within
British India

“Or a letter of request.”—These words are new. See s. 77 above.

6. Every Court receiving a commission for the examination of any person shall examine him or cause to be examined pursuant thereto.

Court to examine witness
pursuant to commission

7. Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court, from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto and the evidence taken under it shall (subject to the provisions of the next following rule) form part of the record of the suit.


Return of commission
with depositions of witnesses.

(*u*) *Huss Doss v. Meer Moazzum* (1871) 15 W. R. 447.

v. Buras (1804) 64 L. J. Q. B. 104; *Keeley v. Wakley* (1803) 9 Times Rep. 571.

(*v*) *Ross v. Woodford* 1894) 1 Ch. 38, 42, *New* (*u*) *ib.*

O. 26,
rr. 8-10.

 8. Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered unless—

When depositions may be read in evidence.

- (a) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or excmpted from personal appearance in Court, or is a civil or military officer of the Government who cannot, in the opinion of the Court, attend without detriment to the public service, or
- (b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (a), and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

Commissions for local investigations.

9. In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court :

³⁰
Provided that, where the Local Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

10. (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

Procedure of Commissioner.

(2) The report of the Commissioner and the evidence O. 26,
rr. 10-13.
Report and depositions
to be evidence in suit. taken by him (but not the evidence without
the report) shall be evidence in the suit
and shall form part of the record ; but the Court, or, with the
permission of the Court, any of the parties to the suit, may
examine the Commissioner personally in open Court touching
Commissioner may be
examined in person. any of the matters referred to him or
mentioned in his report, or as to his report,
or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with
the proceedings of the commissioner, it may direct such fur-
ther inquiry to be made as it shall think fit.

Commissions to examine accounts.

11. In any suit in which an examination or adjustment
Commission to examine
or adjust accounts. of accounts is necessary, the Court may
issue a commission to such person as it
thinks fit directing him to make such examination or adjust-
ment.

2. (1) The Court shall furnish the Commissioner
Court to give Commis-
sioner necessary instruc-
tions. with such part of the proceedings and
such instructions as appear necessary, and
the instructions shall distinctly specify
whether the Commissioner is merely to transmit the pro-
ceedings which he may hold on the inquiry, or also to report
his own opinion on the point referred for his examination.

(2) The proceedings and report (if any) of the Com-
Proceedings and report to
be evidence; Court may
direct further inquiry. missioner shall be evidence in the suit,
but where the Court has reason to be dis-
satisfied with them, it may direct such
further inquiry as it shall think fit.

Commissions to make partitions.

13. Where a preliminary decree for partition has been
passed, the Court may, in any case not
Commission to make
partition of immoveable
property. provided for by section 54, issue a com-
mission to such person as it thinks fit to
make the partition or separation according to the rights as
declared in such decree.

Cl. 26,
rr. 14-16.

14. (1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court: and the Court, after hearing any objections which the parties may make to the report, or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied: but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

General provisions.

15. Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

16. Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment,—

- (a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;

(b) call for and examine documents and other things O. 26,
rr. 16-18
relevant to the subject of inquiry ;

(c) at any reasonable time enter upon or into any
land mentioned in the order.

17. (1) The provisions of this Code relating to the
summoning, attendance and examination
Attendance and examina-
tion of witnesses before
Commissioner. of witnesses, and to the remuneration of,
and penalties to be imposed upon, wit-
nesses, shall apply to persons required to give evidence or to
produce documents under this Order whether the commission
in execution of which they are so required has been issued
by a Court situate within or by a Court situate beyond the
limits of British India, and for the purposes of this rule the
Commissioner shall be deemed to be a Civil Court.

(2) A Commissioner may apply to any Court (not being
a High Court) within the local limits of whose jurisdiction a
witness resides for the issue of any process which he may
find it necessary to issue to or against such witness, and such
Court may, in its discretion, issue such process as it considers
reasonable and proper.

18. (1) Where a commission is issued under this
Parties to appear before
Commissioner. Order, the Court shall direct that the
parties to the suit shall appear before the
Commissioner in person or by their agents or pleaders.

(2) Where all or any of the parties do not so appear the
Commissioner may proceed in their absence.

ORDER XXVII.

*Suits by or against the Government or Public Officers in
their official capacity.*

1. In any suit by or against the Secretary of State for O. 27, r.
Suits by or against Go-
vernment. India in Council, the plaint or written
statement shall be signed by such person
as the Government may, by general or special order, appoint

O. 27, in this behalf, and shall be verified by any person whom
rr. 16. the Government may so appoint and who is acquainted with
the facts of the case.

Suits by or against Government.—Suits by or against the Government must be instituted by or against the Secretary of State for India in Council; see s. 79 above.

Notice in suits against Secretary of State or public officer.—See s. 80 above.

2. Persons being *ex-officio* or otherwise authorised to act
Persons authorized to act for Government. for the Government in respect of any judicial proceeding shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of the Government.

3. In suits by or against the Secretary of State for
Plaints in suits by or against Government. India in Council, instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert the words "The Secretary of State for India in Council."

4. The Government pleader in any Court or such
Agent for Government to receive process. other person as the Local Government may for any Court appoint in this behalf, shall be the agent of the Government for the purpose of receiving processes against the Secretary of State for India in Council issued by such Court.

5. The Court, in fixing the day for the Secretary of
Fixing of day for appearance on behalf of Government. State for India in Council to answer to the plaint, shall allow a reasonable time for the necessary communication with the Government through the proper channel, and for the issue of instructions to the Government pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government, and may extend the time at its discretion.

6. The Court may also, in any case in which the Govern-
Attendance of person able to answer questions relating to suit against Government. ment pleader is not accompanied by any person on the part of the Secretary of State for India in Council, who may be able to answer any material questions relating to the suit, direct the attendance of such a person.

7. (1) Where the defendant is a public officer and, on receiving the summons, considers it proper to make a reference to the Government before answering the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel.

Extension of time to enable public officer to make reference to Government.

O. 1
rr. 7

(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary.

8. (1) Where the Government undertakes the defence of a suit against a public officer, the Government pleader upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits.

Procedure in suits against public officer

(2) Where no application under sub-rule (1) is made by the Government pleader on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties :

Provided that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree.

ORDER XXVIII.

Suits by or against Military Men.

1. (1) Where any officer or soldier actually serving the Government in a military capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorize any person to sue or defend in his stead.

Officers or soldiers who cannot obtain leave may authorize any person to sue or defend for them.

O. 28,

(2) The authority shall be in writing and shall be signed by the officer or soldier in the presence of (a) his commanding officer, or the next subordinate officer, or (b) where the officer

O. 28,
rr. 1-3. or soldier is serving in military staff employment, the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority, which shall be filed in Court.

(3) When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer or soldier by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person.

Explanation.—In this Order the expression “commanding officer” means the officer in actual command for the time being of any regiment, corps, detachment or dépôt to which the officer or soldier belongs.

2. Any person authorized by an officer or a soldier to prosecute or defend a suit in his stead may Person so authorized may act personally or appoint pleader. prosecute or defend it in person in the same manner as the officer or soldier could do if present; or he may appoint a pleader to prosecute or defend the suit on behalf of such officer or soldier.

3. Processes served upon any person authorized by an officer or a soldier under rule 1 or upon Service on person so authorized or on his pleader, to do good service. any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person.

ORDER XXIX.

Suits by or against Corporations.

O. 29, r. 1. 1. In suits by or against a corporation, any pleading Subscription and verification of pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

“Who is able to depose to the facts of the case.”—Where a plaint or written statement is signed and verified by a director, secretary or other principal officer of a corporation, it must be stated in the plaint that he is a director, secretary or principal

officer of the Company, and that he is able to depose to the facts of the case. If there is no such statement in the plaint or written statement, the plaint or written statement should not be admitted, unless the defect is made good by an affidavit containing such statement (x).

O.
rr.

2. Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served—

Service on corporation.

- (a) on the secretary, or on any director, or other principal officer of the corporation, or
- (b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business.

3. The Court, may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit.

Power to require personal attendance of officer of corporation.

ORDER XXX.

Suits by or against Firms and Persons carrying on business in names other than their own.

1. (1) Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

(2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this

(x) *Sreenath v. East Indian Railway Coy.* (1896) 22 Cal. 268.

30. r. 1. Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.

Suit by or against firms.—The whole of this Order is new. The rules as to the *attachment* of partnership property and the *execution* of decree against firms will be found in O. 21, rr. 49 and 50 above.

This order deals with the mode of suing firms. Rule 1 provides that two or more persons claiming or being liable as partners may sue or be sued in the firm's name. Rule 2 provides that where a suit is instituted by partners in the name of their firm, the plaintiffs shall, on demand in writing by the defendant, declare in writing the names and places of residence of the partners. If the plaintiffs fail to comply with the demand, the Court may stay further proceedings. If the demand is complied with, the suit will proceed as if all the partners had been named as plaintiffs in the plaint. As regards *signature and verification* where a suit is brought in a firm name, it is provided by r. 1, sub-r. (2) that it will suffice if the pleading or any other document required to be signed or verified is signed or verified by *any one* of the partners: it is not necessary that all the partners should sign or verify it. As regards *appearance* in a suit brought against a firm, it is to be noted that a firm cannot appear as a firm, and the partners should therefore appear individually in their own names, but all subsequent proceedings should continue in the name of the firm (r. 6). Where a suit is brought against a firm no partner can put in a personal defence (g). He can only file a written statement *for and in the name of the firm*. The decree also must be in the name of the firm (z), though all the partners may not have appeared (a). As to execution of a decree passed against a firm, see O. 21, r. 50.

Rule 9 applies to suits *between co-partners*, and rule 10 to suits *against a person* carrying on business in a name other than his own name.

"At the time of the accruing of the cause of action."—These words show that a suit may be brought by or against a firm in the firm name though the firm may have been dissolved before the date of the suit, provided the cause of action arose before dissolution. (b).

"Carrying on business in British India."—This rule applies to all partnerships carrying on business in British India. Therefore a firm which carries on business in British India may be sued in the firm name under this rule, although it be a foreign firm the members of which are resident out of the jurisdiction (c).

Statement of names and addresses.—Rule 2 enables a *defendant* to obtain disclosure of the names of the partners in a plaintiff *firm* by a statement in writing by the plaintiffs or their pleader. Under r. 1 *any party* to the suit may *apply to the Court* for a statement of the names of the partners in the *plaintiff or defendant firm* to be furnished and verified in such manner as the Court may direct.

Suits by or against individual partners.—See Indian Contract Act, 1872. ss. 43 and 45.

(1) *Ellis v. Wadson* [1899] 1 Q. B. 714.

(2) *Harris v. Beauchamp Brothers* [1899] 2 Q. B. 534, 535.

(a) *Lysaght, Ltd. v. Clark & Co.* [1891] 2 Q. B. 552.

(1) *Davis & Son v. Morris* (1883) 10 Q. B. D. 463.

(c) *Worcester City & County Banking Co. v. Fribank, Pauling & Co.* (1894) 1 Q. B. 784.

2. (1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted. O. 30,
rr. 2, .

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub-rule (1), all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct.

(3) Where the names of the partners are declared in the manner referred to in sub-rule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint :—

Provided that all the proceedings shall nevertheless continue in the name of the firm.

Disclosure of partners' names.—If the plaintiff firm has not made a full disclosure of their partners, the proper procedure is not to dismiss the suit, but to allow the firm to put in a further declaration making a full disclosure, and thus remedy the defect (d).

3. Where persons are sued as partners in the name of their firm the summons shall be served either —

(a) upon any one or more of the partners, or

(b) at the principal place at which the partnership business is carried on within British India, upon any person having, at the time of service, the control or management of the partnership business there,

as the Court may direct ; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India :

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the

(d) *Imperial Pressing Co. v. British Crown Assurance Corporation* (1918) 41 Cal. 561, 585.

- O. 30, institution of the suit, the summons shall be served upon
 rr. 3, 4. every person within British India whom it is sought to make
 liable.

Service of summons—This rule is to be read with r. 1 above and with O. 21, r. 50. It applies only to suits against partners *in the name of their firm*. It provides a special mode of service upon firms *carrying on business in British India*, whether the partners reside within or without British India (e). One mode of service authorised by the rule is service upon any one or more of the partners; the other is service at the principal place of business of the partnership, within British India, upon the manager of such business. If the summons is not served in either of these ways, the service is irregular (f). If it is served in either of these ways, the service is good service *upon the firm*, whether all or any of the partners are within or without British India. The service being good service *upon the firm*, any decree that may be passed in the suit against the firm may be executed against the property of the firm or partnership.

If the service is effected in the first mode prescribed by the rule, that is, if the service is *upon a partner*, it is good service upon the firm, as well as upon that partner personally, but it is not service upon any other member of the firm so as to make such member “a person who has been *individually* served as a partner,” etc., within O. 21, r. 50, sub-r. (1), cl. (c). Similarly, if the service is effected in the second mode prescribed by the rule, that is, *upon a manager* at the place of partnership business, and the manager is not a partner, the service is good service upon the firm, but it is not service upon any member of the firm so as to make such member “a person who has been *individually* served as a partner,” etc., within O. 21, r. 50, sub-r. (1), cl. (c) (g). This distinction is important for the purposes of execution, for, as we have seen in O. 21, r. 50, where a decree has been passed against a firm, execution can be issued without leave of the Court against the property of the firm, and also against the separate property of any individual partner who was served with the writ. But execution cannot be issued without leave of the Court against the separate property of any partner who was not served with the writ and did not appear.

4. (1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have—

(e) *Grant v. Anderson & Co.* (1892) 1 Q. B. 108.

(f) See *Worcester City and County Banking Co. v. Farbank, Pauling & Co.* (1894) 1 Q. B. 784.

788-790.

(g) *In re Ide* (1886) 17 Q. B. D. 765.

(a) to apply to be made a party to the suit, or

O. 30,
rr. 4, 5.

(b) to enforce any claim against the survivor or survivors.

Indian Contract Act, 1872, s. 45.—A passes a promissory note for Rs. 5,000 to a firm consisting of two partners B and C. If B dies, C alone cannot sue to recover the amount of the note. The suit must, under s. 45 of the Contract Act, be brought by C along with B's legal representative (h). The effect of the present rule is that where the suit is brought in the firm name, it is not necessary to join B's legal representative as a party plaintiff. But the legal representative may apply to be made a party plaintiff. The mere fact that he does not apply will not affect his right to claim the benefit of any decree that may be passed against A.

5. Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner.

Notice in what capacity served.

Notice in what capacity served.—Where a suit is brought against a firm in the firm name, the summons will be issued against the firm. Such summons may be served either upon any one or more of the partners or upon the person in control of the business. The present rule provides that the person served should be informed by notice in writing given at the time of service, whether he is served as a partner, or as a person in control of the business, or in both characters. In default of notice the person served will be deemed—not merely presumed—to be served as a partner. If he contends that he is not a partner, the proper course for him to adopt is to appear under protest under r. 8 below denying that he is a partner. If he does not do so, he will be deemed to have been served personally as a partner within the meaning of O. 21, r. 50. sub-r. (1), cl. (c), and execution may be granted against him personally (i).

Form of notice.—"Take notice that the summons served herewith is served on you—

- (i) as a partner in the defendant firm of AB & Co. :
- (ii) or as the person having the control or management of the partnership business of AB & Co. :
- (iii) or as a partner in the defendant firm of AB & Co., and also as the person having the control or management of the partnership business of AB & Co."

(h) *Dylar Chand v. Balram Das* (1877) 1 All. 463.
(i) *Baiyab v. Bank of Bengal* (1914) 19 C. W. N.

O. 30,
rr. 6-8.

6. Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

Appearance of partners.

Appearance of partners.—Though all proceedings in a suit instituted against a firm in the firm name are to be conducted *in the firm name*, the partners should, so far as appearance is concerned, appear individually *in their own names*. The reason of the rule is that a firm cannot appear as a firm. Where a suit is brought against a firm in the firm name, the appearance of one partner is the appearance of the firm (*j*).

“All subsequent proceedings shall continue in the name of the firm.”—

Where persons are sued as partners *in the firm name*, every subsequent proceeding must be headed with the firm name as defendants. The written statement must be headed in the firm name, and the decree also must be against the firm in the firm name. The Court cannot in such a suit pass any *personal* decree against a partner, unless he is sued *personally* along with the firm (*k*).

7. Where a summons is served in the manner provided by rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued.

No appearance except by partners.

8. Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared.

Appearance under protest.

Appearance under protest.—Where a person served with summons as a partner denies that he is a partner, he may enter appearance under protest under this rule. Where an appearance is entered under protest, its effect is to nullify the service altogether as regards the defendant firm. In such a case, the plaintiff may disregard the appearance under protest altogether and have the summons served upon one who is admittedly a partner or one who has the control or management of the defendant firm, as provided by r. 3 above, and having obtained a decree against the firm, he may apply for leave to execute it against such person under O. 21, r. 50. But the plaintiff is not bound to adopt this course. He may take out a chamber summons and contend that the party who appeared under protest is a partner or was a partner at the time the cause of action accrued, and apply on that basis to strike out of such appearance the denial of partnership. See Annual Practice, notes to O. 48 A, rr. 4 and 7.

(j) *Lysaght Ltd. v. Clark & Co.* (1891) 1 Q. B. 552, 556. | (k) *Taylor v. Collier* (1882) 30 W. R. (Eng.) 701.

9. This Order shall apply to suits between a firm and O. 30,
rr. 9, 10.
Suits between co-partners one or more of the partners therein and
to suits between firms having one or more
partners in common; but no execution shall be issued in such
suits except by leave of the Court. and, on an application
for leave to issue such execution all such accounts and in-
quiries may be directed to be taken and made and directions
given as may be just.

Scope of the rule.—This rule provides that suits between a firm and one of its members, or between two firms with a common member, may be instituted in the firm name, provided the firms carry on business in British India (r. 1). But no execution can be issued in such a suit *except by leave of the Court*

10. Any person carrying on business in a name or
Suits against person carrying on business in name other than his own style other than his own name may be
sued in such name or style as if it were
a firm name; and, so far as the nature of
the case will permit, all rules under this Order shall apply.

Scope of the rule.—A person trading by himself as a firm or in an assumed or trading name may be sued in his trade name, but he cannot sue in that name (l). This rule does not enable a plaintiff to sue the proprietor of a newspaper in the name of the newspaper (m).

ORDER XXXI.

Suits by or against Trustees, Executors and Administrators.

1. In all suits concerning property vested in a trustee, O. 31, r. 1.
Representation of beneficiaries in suits concerning property vested in trustees, etc. executor or administrator, where the con-
tention is between the persons beneficially
interested in such property and a third
person, the trustee, executor, or adminis-
trator shall represent the persons so interested, and it shall not
ordinarily be necessary to make them parties to the suit.
But the Court may, if it thinks fit, order them or any of them
to be made parties.

(l) *Mason v. Moorgridge* (1892) 8 Times Rep. 805.
(m) *De Bernales v. New York Herald* [1893] Q. B. |

O. 31, rr. 1-3. **When beneficiaries may be added as parties.**—Beneficiaries should always be made parties when the trustees are not wholly uninterested in the case (n), or they have an interest adverse to that of the beneficiaries (o).

2. Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them :

Holder of trustees, executors and administrators

Provided that the executors who have not proved their testator's will and trustees, executors and administrators outside British India, need not be made parties.

3. Unless the Court directs otherwise, the husband of a married trustee, administratrix or executrix shall not as such be a party to a suit by or against her.

Husband of married executrix not to join

ORDER XXXII.

Suits by or against Minors and Persons of Unsound Mind.

O. 32, r. 1. **1.** Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.

Minor to sue by next friend.

Who is a minor.—Every person domiciled in British India who has not completed the age of 18 years is a minor. In the case, however, of a minor of whose person or property a guardian has been appointed by a Court of Justice, or whose property is under the superintendence of a Court of Wards, the age of majority is deemed to have been attained on the minor completing his age of 21 years : see Indian Majority Act IX of 1875, s. 3.

Object of having next friend or guardian ad litem.—As a minor is deemed incapable of prosecuting or defending a suit himself, it is necessary that his interests in the suit should be watched by an adult person. Such person is, in the case of a minor plaintiff, called his next friend, and in the case of a minor defendant, his guardian *ad litem* or guardian for the suit. But neither the next friend nor the guardian *ad litem* is a party to the suit (p).

Title of suit.—Where a suit is brought on behalf of a minor, the title of the suit should run thus : “ A. B., a minor by his next friend C. D. v. X. Y.” Where a

(n) *Clegg v. Rowland* (1866) L. R. 3 Eq. 373.
(o) *Beresford v. Ramasubbai* 1890) 13 Mad. 197

(p) *Rup Chand v. Dasodha* (108) 30 All. 55 56

suit is brought against a minor, the title of the suit should be: "*F. G. v. A. B. a minor, by his guardian ad litem C.D.*"

O. 32,
rr. 1-3.

Case in which a minor may sue without a next friend.—A minor can sue in a Presidency Small Cause Court without a next friend, when the amount claimed does not exceed Rs. 500, and is due to him for wages or for work done as a servant: Presidency Small Cause Courts Act 15 of 1882, s. 32.

2. (1) Where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented.

Where suit is instituted without next friend, plaint to be taken off the file

(2) Notice of such application shall be given to such person, and the Court after hearing his objections (if any), may make such order in the matter as it thinks fit.

Taking the plaint off the file.—This rule contemplates the case where a suit is instituted by a minor without a next friend. In such a case the defendant may apply under this rule to have the plaint taken off the file. To bring his case within the rule, the defendant must show that the plaintiff is a minor and that the suit was instituted without a next friend.

3. (1) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor.

Guardian for the suit to be appointed by Court for minor defendant

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(4) No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, or where there is no such guardian, upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

O. 32, rr. 3, 4. **"Proper" person to be appointed guardian ad litem.**—It is the duty of the Judge himself to decide who is the proper person to be appointed as guardian *ad litem* (g).

Where a minor defendant is not represented at all by a guardian ad litem.—The provisions of this rule as to the appointment of a guardian *ad litem* for a minor defendant are imperative. Hence if a minor is sued without a guardian *ad litem*, and a decree is passed against him, the decree is a nullity, and it cannot be enforced against him (r).

Where a minor defendant is substantially represented by a guardian ad litem.—There are cases in which there have been no formal application and no formal order for the appointment of a guardian *ad litem* for a minor defendant, but in which the proceedings show that the minor was *substantially* represented by a guardian *ad litem*. In such cases it has been held that the want of a formal application and order for the appointment of a guardian *ad litem* is but an *irregularity* and that the decree will bind the minor unless it is shown that the defect in procedure has prejudiced the minor (s). In *Walian v. Banke Behari* (t), a suit was brought against a minor, but no order was applied for and none was made for the appointment of a guardian *ad litem*. In the plaint, however, which was admitted by the Court, the mother of the minor was described as his guardian. Further, the mother appeared throughout the proceedings in the suit as the minor's guardian. A decree was passed against the minor, and in the decree and the execution proceedings the mother was described as the minor's guardian. In a suit brought by the minor on attaining majority to set aside the decree passed against him on the ground that no guardian *ad litem* had been appointed as required by the present rule it was held by their Lordships of the Privy Council that the Court in which the former suit was instituted had by its action given sanction to the appearance of the mother as a guardian *ad litem*, and that the absence of a formal order of appointment was not fatal to the suit, unless it was shown that the defect in procedure had prejudiced the minor. Their Lordships observed that there was nothing in the proceedings of that suit to suggest that the interests of the minor were not duly protected by the mother or that the defect in procedure had prejudiced the minor and they accordingly held that the decree was binding upon the minor. It is clear from what has been stated above that the mere absence of an affidavit such as is required by sub-r. (3) is not sufficient to render the proceedings illegal and void as against a minor (u).

• 4. (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit :

Who may act as next friend or be appointed guardian for the suit.

Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(g) *Ramchandra Das v. Joti Prasad* (1907) 29 All. 675, 678.

(r) *Dakeshur v. Kesari* (1897) 24 Cal. 25; *Hanuman v. Muhammad* (1906) 28 All. 137; *Deji v. Dhirajram* (1888) 12 Bom. 18.

(s) *Walian v. Banke Behari* (1903) 30 Cal. 1021, 30

I. A. 182; *Hari v. Bhubaneswari* (1882) 10 Cal. 40, 15 I. A. 195.

(t) (1903) 30 Cal. 1021, 30 I. A. 182.
(u) *Munnu Lal v. Ghulam Abbas* (1910) 32 All. 287, 37 I. A. 77.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be. O. 32,
rr. 4, 5.

(3) No person shall without his consent be appointed guardian for the suit.

(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.

Married woman as guardian *ad litem*.—Under the Code of 1882, though a married woman could be appointed next friend of a minor plaintiff, she could not be appointed guardian *ad litem* of a minor defendant. Under this Code she may be appointed guardian *ad litem* as well.

Officer of Court as guardian *ad litem*.—An officer of Court who has been appointed guardian *ad litem* should not be paid for his trouble (v). If he has no funds to conduct adequately the defence of the minor, the Court has the power to relieve him of his position as guardian (w).

5. (1) Every application to the Court on behalf of a minor, other than an application under rule 10, sub-rule (2), shall be made by his next friend or by his guardian for the suit.

Representation of minor
by next friend or guardian
for the suit

(2) Every order made in a suit or on any application, before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, where the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader.

(v) *Kerakoos v. Serle* (1844) 3 M. L. A. 320. | (w) *Gopjal v. Agarsingh* 4 (1904) 28 Bom. C.C.

O. 32,
rr. 6, 7.

6. (1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other moveable property on behalf of a minor either—

Receipt by next friend or guardian for the suit of property under decree for minor

- (a) by way of compromise before decree or order, or
- (b) under a decree or order in favour of the minor.

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other moveable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.

7. (1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

Agreement or compromise by next friend or guardian for the suit

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor.

Compromise decree when binding on a minor.—To render a decree passed in pursuance of a compromise binding on a minor, the following conditions must be complied with :—

- (a) The next friend or guardian *ad litem* must apply to the Court for leave to enter into the proposed compromise (x), stating specifically that the compromise is sought to be made on behalf of minor (y), and also setting forth the terms of the proposed compromise (z).
- (b) On such an application being made to the Court, the Court must exercise a judicial discretion as to the propriety, in the interests of the minor, of the proposed compromise (a). And if the Court sees reason to grant leave, it should record an order showing that an application has been made to it, that the terms of the proposed agreement or compromise have been considered by it, and that having regard to the interests of the minor, it has

(x) *Kalavati v. Chedilal* (1895) 17 All. 531.

(y) *Manohar Lal v. Jaganath Singh* (1906) 28 All. 585, 33 I. A. 128.

(z) *Virupakshappa v. Shidappa* (1902) 26 Bom. 109.

(a) *Kalavati v. Chedilal* (1895) 17 All. 531.

granted leave to make the agreement or compromise (b). A compromise will be deemed to be beneficial to the interests of a minor if it secures to the minor some demonstrable advantage, or averts some obvious mischief (c). O. 32, rr. 7-9.

- (c) The leave must be *express*, not implied. It must, in the language of this rule, be *expressly recorded* in the proceedings. From the mere fact that the Court has passed a decree in accordance with a compromise it cannot be inferred that any of the steps preliminary and necessary to the making of the decree have been taken by the Court. The Court by passing a decree in pursuance of a compromise does not *ipso facto* sanction the compromise (d).

If the above conditions are not complied with, the decree is not binding on the minor. The decree, however, is *not void*. It is only *voidable* at the option of the minor. No other party to the suit can call the decree in question: the minor alone is entitled to call it in question, and this he may do either on attaining majority or before then through a next friend (e).

Where the minor is a member of a joint Hindu family.—When the father of a minor, a member of a joint Hindu family, of which the father is the managing member, is appointed his *guardian ad litem*, his powers as managing member, so far as they relate to the minor's interest, are controlled by the provisions of the present rule, and he cannot, without the leave of the Court, enter into any agreement or compromise on behalf of the minor with reference to the suit. Such an agreement is not binding on the minor even if it was a *bona fide* settlement of a disputed claim (f).

8. (1) Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred.

(2) The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed, and also that he has no interest adverse to that of the minor.

9. (1) Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or where he does not do his duty, or, during the pendency of the suit, ceases to reside

(b) *Manohar Lal v. Jadunath Singh* (1900) 28 All. 585, 33 I. A. 128; *Bhiva v. Devchand* (1911) 85 Bom. 322; *Sethuram v. Vasanta* (1910) 84 Mad. 314.
(c) *Dharmaji v. Gurrav* (1873) 10 B. H. C. 311.
(d) *Manohar Lal v. Jadunath Singh* (1900) 28 All.

585, 33 I. A. 128.
(e) *Virepakashappa v. Shidappa* (1902) 26 Bom. 109.
(f) *Ganesh Row v. Tuljaram Row* (1913) 36 Mad. 295, 40 I. A. 182.

O: 32.
rr. 9-11. within British India, or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal; and the Court, if satisfied of the sufficiency of the cause assigned may order the next friend to be removed accordingly, and make such other order as to costs as it thinks fit.

(2) Where the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit.

Where the next friend does not do his duty.—Where a Court finds that a next friend does not do his duty in relation to a suit, it is its duty not to permit him to prejudice the interests of the minor, but to adjourn the suit in order that some one interested in the minor may apply on behalf of the minor for the removal of the next friend and for the appointment of a new next friend, or that the minor plaintiff himself may on coming of age, elect to proceed with the suit or withdraw from it (*g*).

10. (1) On the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place.

Stay of proceedings on removal, etc., of next friend.

(2) Where the pleader of such minor omits within a reasonable time to take steps to get a new next friend appointed, any person interested in the minor or in the matter in issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit.

11. (1) Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit.

Retirement, removal or death of guardian for the suit.

(2) Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place. O. 32,
rr. 11-13.

12. (1) A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application.

Course to be followed by
minor plaintiff or applicant
on attaining majority

(2) Where he elects to proceed with the suit or application he shall apply for an order discharging the next friend and for leave to proceed in his own name.

(3) The title of the suit or application shall in such case be corrected so as to read thenceforth thus:—

“*A. B.*, late a minor, by *C. D.*, his next friend, but now having attained majority.”

(4) Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend.

(5) Any application under this rule may be made *ex-parte*: but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend.

13. (1) Where a minor co-plaintiff on attaining majority desires to repudiate the suit, he shall apply to have his name struck out as co-plaintiff; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit.

Where minor co-pl. desires
attaining majority, to repudiate suit.

(2) Notice of the application shall be served on the next friend, on any co-plaintiff and on the defendant.

(3) The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs

O. 32,
rr. 13-16. (4) Where the applicant is a necessary party to the suit.
the Court may direct him to be made a defendant.

14. (1) A minor on attaining majority may, if a sole
Unreasonable or improper
suit. plaintiff, apply that a suit instituted in
his name by a next friend be dismissed
on the ground that it was unreasonable or improper.

(2) Notice of the application shall be served on all the parties concerned; and the court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit. or make such other order as it thinks fit.

15. The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to
Application of rules to
persons of un-sound mind. persons adjudged to be of unsound mind
and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.

Persons of unsound mind.—The present rule makes the provisions of rules 1 to 14 applicable to persons of unsound mind. The result is that where a person of unsound mind is a plaintiff, a suit on his behalf must be brought by a next friend. and where he is a defendant, the suit must be defended by a guardian *ad litem*. Where a manager has been appointed of the property of a lunatic under the Lunacy Act, no person other than such manager should act as the next friend of the lunatic in a suit in respect of the lunatic's property (*h*). See r. 4, sub-r. (2) above.

Persons adjudged to be of unsound mind.—A person may be adjudged to be of unsound mind under the Lunacy Act 1 of 1912

16. Nothing in this Order shall apply to a Sovereign Prince or Ruling Chief suing or being sued
Savings for Princes and
Chiefs. in the name of his State, or being sued by direction of the Governor-General in Council or a Local Government in the name of an agent or in any other name, or shall be construed to affect or in any way derogate from the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind.

ORDER XXXIII.

Suits by Paupers.

Suits may be instituted in forma pauperis.

1. Subject to the following provisions, any suit may be instituted by a pauper.

Explanation.—A person is a “pauper” when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit.

Scope and object of the Order.—A plaintiff suing in a civil Court must pay the Court fee prescribed by law for the plaint and subsequent proceedings in the suit. These fees are prescribed by the Court Fees Act VII of 1870. But a person may be too poor to pay the Court fee, and the object of this Order is to enable such person to bring and prosecute suits without payment of Court fees (i). There are, however, certain fees from which even a pauper is not exempted, namely, fees for service of process, and such fees must be paid by him (r. 8). If the pauper succeeds in the suit, the Government have a first charge on the subject-matter of the suit for the amount of the Court fees which would have been paid by him if he had not been permitted to sue as a pauper (r. 10). If the pauper fails in the suit, the Court should order him to pay the Court fees due by him (r. 11).

“Subject-matter of the suit.”—In determining whether a person claiming to sue as a pauper is worth Rs. 100, neither the value of his necessary wearing apparel nor the value of the property claimed by him in the suit should be taken into consideration. The ground for excluding the “subject-matter of the suit” under this rule is because such property is presumably out of the pauper’s reach and cannot be made use of by him to carry on his litigation (j).

A applies for leave to sue as a pauper for the recovery of certain ornaments worth Rs. 2,000 from B. Pending the investigation into pauperism, B deposits in Court a portion of the ornaments claimed by A of the value of Rs. 100 as ornaments belonging to A. The ornaments deposited in Court, being entirely at A’s disposal, are no longer part of the “subject-matter of the suit.” From the moment of the deposit A becomes “entitled to property worth Rs. 100,” and hence he is not entitled to sue as a pauper for the rest of the ornaments (k). In a recent case, however, Macleod, J., expressed the opinion that A could not be said in such a case to be entitled to property worth Rs. 100, for otherwise every application for leave to sue as a pauper may be defeated by the respondent paying into Court Rs. 100 out of the amount claimed (l).

A owns a property worth Rs. 7,000. A mortgages the property to B to secure payment of Rs. 2,000 advanced by B to A. A then sues B for redemption. A’s equity

(i) *Jotindra v. Dwarka* (1893) 20 Cal. 111, 115.
(j) *Muhammad v. Ajudha* (1888) 10 All. 467.

(k) *Dwariknath v. Madharav* (1898) 10 Bom. 207.
(l) *Fatmabas v. Dossabhai* (1909) 34 Bom. 638.

O. 33, rr. 1-4. of redemption is no part of the subject-matter of the suit. Therefore, its value should be taken into consideration in determining whether A is a pauper (m). The value of the equity of redemption being about Rs. 5,000 [=Rs. 7,000—Rs. 2,000], A is not a pauper within the meaning of this rule.

Prosecution of suit as pauper.—A plaintiff may be allowed to *continue* as a pauper a suit instituted by him in the ordinary way (n).

Pauper defendant.—Although the Code provides only for suits to be brought by a pauper plaintiff, the Court has inherent power to allow a *defendant* to defend in *forma pauperis* (o). See s. 151 above.

2. Every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits; a schedule of any moveable or immoveable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto; and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings.

Procedure.—Rules 2 to 8 prescribe the procedure to be followed when a suit is proposed to be instituted in *forma pauperis*.

3. Notwithstanding anything contained in these rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.

Purda-nashin women.—A purda-nashin woman exempted from appearing in Court under s. 132 above may present the application for leave to sue as a pauper by a duly authorized agent (p).

4. (1) Where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant, or his agent, when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

(m) *Kapil Deo v. Ram Rikha* (1910) 33 All. 238.

(n) *Rewji v. Sakharam* (1884) 8 Bom. 615; *Thompson v. Calcutta Tramway Co.* (1893) 20 Cal. 319.

(o) *Doorga Churn v. Nitokally* (1890) 5 Cal. 819.

(p) *Wazir-un-nissa v. Ilahi Bakhsh* (1902) 24 Al. 172.

(2) Where the application is presented by an agent, the Court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken.

O. 33,
rr. 4, 5.

If presented by agent,
Court may order applicant
to be examined by commis-
sion.

Rejection of application

5. The Court shall reject an application for permission to sue as a pauper—

- (a) where it is not framed and presented in the manner prescribed by rules 2 and 3, or
- (b) where the applicant is not a pauper, or
- (c) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper, or
- (d) where his allegations do not show a cause of action, or
- (e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter.

Clause (c): fraudulent disposal of property.—Thus if a person has property worth Rs. 1,000, and he disposes of the same in August 1915 to enable himself to sue as a pauper, and applies for leave to sue as a pauper in September 1915, the application must be rejected under this rule.

Clause (d): cause of action.—The application to sue as a pauper should be rejected, if the right to sue is barred by the law of limitation (g), or as *res judicata* (i), or if it does not disclose a good cause of action as where the application is for leave to sue on a contract which is void as being immoral and opposed to public policy (e).

Clause (e): transfer of interest in subject-matter of proposed suit.—The interest transferred may be either vested or contingent. Thus an agreement authorising a pleader to recover his fees out of the revenue of a village forming the subject-matter of the proposed suit, *in the event of the applicant failing to pay the fees to the pleader*, is an agreement under which the pleader obtains a contingent interest in the subject-matter of the suit. If such an agreement is proved, the application for leave to sue *in forma pauperis* must be rejected (i).

(g) *Chattarpal v. Raja Ram* (1883) 7 All. 661.
(i) *Vijendra v. Sudhendra* (1898) 19 Mad. 127.

(e) *Dular v. Vallabdas* (1880) 13 Bom. 126.
(i) *Manohar v. Lakshman* (1885) 9 Bom. 371.

O. 33.
rr. 6-9.

6. Where the Court sees no reason to reject the application on any of the grounds stated in rule 5, it shall fix a day (of which at least ten days' clear notice shall be given to the opposite party and the Government pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof.

Notice of day for receiving evidence of applicant's pauperism.

7. (1) On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make a memorandum of the substance of their evidence.

Procedure at hearing

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in rule 5.

(3) The Court shall then either allow or refuse to allow the applicant to sue as a pauper.

Scope of inquiry under this rule.—The examination under this rule is not limited to the question of pauperism, but embraces all matters referred to in r. 5 (u).

8. Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any Court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit.

Procedure if application admitted.

9. The Court may, on the application of the defendant or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

Dispaupering.

(a) if he is guilty of vexatious or improper conduct in the course of the suit; O. 33,
rr. 9, 10.

(b) if it appears that his means are such that he ought not to continue to sue as a pauper; or

(c) if he has entered into any agreement with reference to the subject-matter of the suit, under which any other person has obtained an interest in such subject-matter.

10. Where the plaintiff succeeds in the suit, the Court shall calculate the amount of Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; such amount shall be recoverable by the Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit.

Costs where pauper succeeds.

Amount of Court-fees shall be first charge.—The charge is to be enforced by an application for the attachment and sale of the subject-matter of the suit. A separate suit for the sale of the subject-matter to realize the Court-fees is now barred: see r. 13 below and s. 47. The application for execution by the Government must be made within three years from the date of the decree in the pauper-suit (v).

Recovery of Court-fees by Government from party ordered to pay the same.—If the plaintiff is directed to pay the Court-fees, the Government may realize the same by an application for execution against the person or property of the plaintiff and if the defendant is directed to pay the Court-fees, the Government may realize the same by an application for execution against the person or property of the defendant.

Crown's prerogative of precedence in respect of Court-fees.—If the plaintiff succeeds in the suit, and the amount payable under the decree is paid into Court, the Government is entitled to payment of the Court-fees out of the fund in Court on a mere application for payment without attaching the fund in the first instance. The reason is that the Crown is entitled to precedence in respect of a Crown debt over all other creditors of the pauper decree-holder. A obtains a decree against B for specific performance and costs in a suit brought in *forma pauperis*. It is directed by the decree that B should pay the Court-fees to Government, and the Court-fees are also declared to be a first charge on the property directed to be conveyed by B to A. B fails to pay A's costs. A therefore applied for attachment and sale of certain property belonging to B for payment of his costs. The property is sold, and the sale proceeds amounting to Rs. 1,000 are paid into Court. Thereafter A's solicitor, C, applies to the Court for payment to him out of the Rs. 1,000 of the costs incurred

O. 33, by him on behalf of A. At the same time a claim is made by the Government
rr. 10, 11. Solicitor for payment of the Court-fees out of the Rs. 1,000 in priority to C's claim. The Government is entitled to precedence in respect of the Court-fees and C is entitled only to the balance left after payment of Court-fees (w).

It is to be observed that in the Calcutta case cited above, C was a creditor of A inasmuch as he was entitled to be paid his costs by A. But he was an *ordinary* creditor only as distinguished from a *secured* creditor. It is also to be observed that Court-fees form a Crown debt, and the Crown was to that extent a creditor of A, for the Court-fees were declared to be a charge on the property directed to be conveyed by B to A. And the rule to be borne in mind is that it is only when claims of the Crown and claims of ordinary creditors or "common persons" (to use an old expression) concur or come into competition that the Crown is preferred. The Crown has no more right than a "common person" to seize X's property and apply it in or towards discharge of a debt due from Y. It was so observed by Lord Macnaghten in a case in which the Privy Council held that where a money decree is obtained by a pauper in a suit by him against Y, and Y is directed by the decree to pay the Court-fees, the Government are not entitled to realize the Court-fees by a sale of Y's property previously mortgaged by him to X, so as to defeat the right of X (x). All that could be sold by the Government in such a case is the equity of redemption of Y in the property (y).

11. Where the plaintiff fails in the
Procedure where pauper fails, suit or is dispaupered, or where the suit is withdrawn or dismissed,—

(a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the Court-fees or postal charges (if any) chargeable for such service, or

(b) because the plaintiff does not appear when the suit is called on for hearing,

the Court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper.

Scope of the rule.—An order under this rule directing the pauper plaintiff to pay the Court-fees can only be made in the following four cases :—

- (1) where the plaintiff *fails* in the suit;
- (2) where the plaintiff is *dispaupered* under r. 9;
- (3) where the suit is *withdrawn*; or

(1) *Gayanoda v. Butta Kristo* (1906) 33 Cal. 1040; (x) *Ragho Prasad v. Mevra Lal* (1911) 34 All. 223, 30 I. A. 62.
Gangpat v. Collector of Kanara (1876) 1 Bom. 7; *Secretary of State v. Bombay Landing and Shipping Co.* (1868) 5 B. H. C. O. C. 23. (y) *Dost Muhammad v. Mani Ram* 1907) 29 All 637.

- (4) where the suit is dismissed under the circumstances specified in cl. (a) or cl. (b). O. 33,
rr. 11-15

It follows from what has been stated above that where an application for leave to sue in *forma pauperis* is returned under O. 7, r. 10, for want of jurisdiction to be presented to the proper Court, no order can be made under this rule directing the applicant to pay the Court-fees. It cannot be said in such a case that the plaintiff has failed in the suit (2). The decision may also be put on the ground that the present rule does not apply until the application is granted, and is numbered and registered under 1. 8 above. But a dismissal of the suit at the request of the plaintiff and the defendant, the suit being settled out of Court, amounts to a *failure* within the meaning of this rule (a).

✓ 12. The Government shall have the right at any time to apply to the Court to make an order for the payment of Court-fees under rule 10 or rule 11.

Government may apply for payment of Court-fees.

13. All matters arising between the Government and any party to the suit under rule 10, rule 11, or rule 12 shall be deemed to be questions arising between the parties to the suit within the meaning of section 47.

Government to be deemed a party.

14. Where an order is made under rule 10, rule 11 or rule 12, the Court shall forthwith cause a copy of the decree to be forwarded to the Collector.

Copy of decree to be sent to Collector.

15. An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper.

Refusal to allow applicant to sue as pauper to bar subsequent application of like nature.

Dismissal for default.—The dismissal of a pauper application for default by non-appearance or for default in prosecution is no bar to a subsequent pauper application in respect of the same right to sue (b).

(2) *Collector of Raimagiri v. Janaidan* (1882) 6 Bom 590. (b) *Bhoj Singh v. Maha Koonwar* (1808) 3 Agra 1. *Mrs L. Umasundari, in the matter of* (1870) 5 B. L. R. App. 20.
(a) *Secretary of State v. Narayan* (1911) 35 Bom 448.

- O. 33, r. 16.** **16.** The cost of an application for permission to sue as a pauper and of an inquiry into pauperism shall be costs in the suit.
- Costs.

I. ORDER XXXIV.

Suits relating to Mortgages of Immoveable Property.

- O. 34, r. 1.** **1. [Act 4 of 1882, s. 85.]** Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

Parties to suits for fore-
closure, sale and redemp-
tion.

Explanation.—A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.

Suits relating to mortgages.—This order is new. It is a re-enactment with slight alterations of the sections of the Transfer of Property Act 4 of 1882 relating to suits on mortgages. The Transfer of Property Act did not contain any provision for the passing of a final decree in cases where payment was made in accordance with the terms of the preliminary decree. This omission has now been remedied, and provision has been made in rules 3 (1), 5 (1) and 8 (1) for the passing of final decrees in such cases. The object of removing the provisions as to mortgage suits from the Transfer of Property Act to the Code is to avoid the confusion that arose in regard to execution in mortgage suits owing to such suits having been dealt with exclusively in the Transfer of Property Act.

Transfer of Property Act 4 of 1882, s. 85.—This rule is a reproduction with certain alterations of s. 85 of the Transfer of Property Act.

Scope and object of the rule.—The object of this rule in requiring all persons having an interest either in the mortgage-security or in the right of redemption to be joined as parties is to avoid multiplicity of suits. The rule applies only to suits relating to a mortgage, that is to say, to suits for foreclosure, sale and redemption, as indicated by the marginal note to the rule. The rule therefore does not apply to suits by the mortgagee for a personal decree against the mortgagor [see Transfer of Property Act, s. 68]. Nor does it apply to suits by a sub-mortgagee [as distinguished from a transferee of a mortgage], for a sub-mortgagee is not entitled to a decree for sale under r. 4 below (c).

Interest in mortgage-security or in right of redemption.—A person who sets up a title paramount to that of the mortgagor and mortgagee should not be joined as a party to such suit, for he is neither interested in the mortgage-security nor

in the right of redemption (*d*). Thus if *A* lets his property on a lease to *B*, and *B* mortgages the leasehold to *C*, *A*, holding the property by title paramount, should not be joined as a party defendant to a suit by *C* to enforce the mortgage against *B* (*e*). Similarly, if *A* and *B* are co-owners of certain property, and *B* mortgages his undivided share to *C*, *A* should not be joined as a party to a suit for sale by *C*, as *A* has no interest in the right of redemption (*f*).

Explanation: prior mortgagees.—The first branch of the Explanation declares that a prior mortgagee is not a necessary party to a suit for sale or foreclosure. Thus if *A* mortgages his property first to *B* and next to *C*, *C* may sue for sale without making *B* a party to the suit. In such a case if a decree for sale is passed, the property would be sold subject to *B*'s mortgage (*g*). But this rule does not preclude *C* from joining *B* as a party. But if he does join *B* as a party, he cannot insist on obtaining from the Court a decree for sale subject to the prior mortgage. He must be ready to redeem *B*, and he will be directed by the decree to do so (*h*).

It follows from the first branch of the Explanation that where the same person holds two mortgages of different dates upon the same property, he may sue on the mortgage of the later date *subject to his rights under the prior mortgage* (*i*).

The second branch of the Explanation declares that a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage. *A* mortgages his property first to *B*, and next to *C*. *B* is not a necessary party to a suit by *A* against *C* for redemption of the mortgage to *C*.

Mortgage of joint family property.—There is a conflict of decisions as to whether where a suit is brought on a mortgage by or against the manager of a joint Hindu family in his representative capacity, the other members of the family are necessary parties to the suit having regard to the provisions of the present rule. In a recent case before the Privy Council where a foreclosure decree was passed against the *manager* of a joint Hindu family, and the other members brought a suit to set aside the decree on the ground that they being interested in the equity of redemption ought to have been joined as parties to the foreclosure suit, but that they were not so joined, their Lordships held that the decree was in the circumstances of the case binding upon them, though they were not joined as defendants to the suit. Their Lordships said: "There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions including foreclosure suits when the managers of a joint Hindu family so effectively represent all other members of the family, that the family as a whole is bound. It is quite clear from the facts of the case and the findings of the Courts upon them that this is a case where this principle ought to be applied: *There is not the slightest ground for suggesting that the manager of the joint family did not act in every way in the interests of the family itself*, and no question arises under s. 85 of the Transfer of Property Act [O. 34, r. 1], *because the mortgagees had no notice of the plaintiffs' interests*" (*j*). As regards notice it may be observed that the suit

(*d*) *Nalakant Banerji v. Suresh Chandra* (1880) 12 Cal. 414, 421, 422, 12 I. A. 171; *Jaggaswar Dutt v. Bhuban Mohan* (1900) 33 Cal. 425.

(*e*) *Jaggaswar Dutt v. Bhuban Mohan* (1900) 33 Cal. 425.

(*f*) *Mon Mohini Ghose v. Parvati Nath Ghose* (1905) 32 Cal. 716.

(*g*) *Kanti Ram v. Kutubuddin* (1896) 22 Cal. 33.

(*h*) *Venkataramana Iyer v. Gompertz* (1908) 31 Mad. 425.

(*i*) *Subramania v. Bolosubramania* (1915) 38 Mad. 927; *Dhondo v. Bhikaji* (1914) 39 Bom. 138, 145.

(*j*) *Shree Shankar v. Jaddo Kumbhar* (1914) 30 All. 383 41 I. A. 216, affirming 35 All. 71.

O. 34, was one under the Transfer of Property Act. S. 85 of the Act contained the words
rr. 1, 2. "provided the plaintiff has notice of such interest." These words do not occur in
the present rule.

2. [Act 4 of 1882, s. 86.] In a
Preliminary decree in suit for foreclosure, if the plaintiff succeeds,
foreclosure-suit. the Court shall pass a decree—

(a) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or

(b) declaring the amount so due at the date of such decree,

and directing—

(c) that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property, but

(d) that, if such payment is not made on or before the day to be fixed by the Court, the defendant shall be debarred from all right to redeem the property.

Right to foreclosure or sale.—The mortgagee has, at any time after the mortgage money has become payable to him, a right to obtain from the Court a decree that the mortgagor should be absolutely debarred of his right to redeem the property, or a decree that the property be sold. A suit to obtain a decree that the mortgagor should be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure. A suit to obtain a decree that the mortgaged property be sold is called a suit for sale [Transfer of Property Act, s. 67]. Rules 2 and 3 relate to decrees in suits for foreclosure. Rules 4 and 5 relate to decrees in suits for sale.

A suit for foreclosure can only be brought where the mortgage is an English mortgage or a mortgage by conditional sale. A suit for sale can only be brought where the mortgage is an English mortgage or a simple mortgage. The holder of a mortgage by conditional sale cannot institute a suit for sale. A simple mortgagee cannot institute a suit for foreclosure. A usufructuary mortgagee cannot institute a suit either for foreclosure or sale [Transfer of Property Act, s. 67].

O. 34,
rr. 2, 3.

Right to redemption.—The mortgagor has, at any time after the mortgage money has become payable by him, a right on payment or tender of the mortgage money, to require the mortgagee to deliver up to him all documents in the mortgagee's possession relating to the mortgaged property, and to retransfer the property to him. This right is called the mortgagor's right to redeem, and a suit to enforce it is called a suit for redemption [Transfer of Property Act, s. 60]. Rules 7 and 8 provide for decree in suits for redemption.

Mortgage of chattels and of intangible property.—A mortgagee of chattels is entitled to foreclosure quite as much as a mortgagee of immovable property. And so also is a mortgagee of intangible property, such as *palas* or turns of worship in a temple (*k*).

3. [Act 4 of 1882, s. 87.] (1) Where, on or before the day fixed, the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

Final decree in foreclosure suit.

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,
and, if so required,—

(b) ordering him to retransfer the mortgaged property as directed in the said decree,—
and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property :

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for such payment.

Power to enlarge time.

O. 34,
rr. 3, 4.

- (3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged.

Discharge of debt.

Discharge of debt on foreclosure.—The effect of a final decree for foreclosure is to vest the mortgaged property absolutely in the mortgagee and to extinguish the mortgage-debt. As the property vests in the mortgagee, the mortgagor is debarred from all right to redeem the property (1). And as the debt is extinguished, the mortgagee can no longer proceed against the mortgagor *personally*.

4. [Act 4 of 1882, s. 88.] (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in clauses (a), (b) and (c) of rule 2 and also directing that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale), be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid, together with subsequent interest and subsequent costs, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same.

Preliminary decree in suit for sale.

- (2) In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff or of any person interested either in the mortgage-money or in the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit including the deposit in Court of a reasonable sum, fixed by the Court to meet the expenses of sale and to secure the performance of the terms.

Power to decree sale in foreclosure-suit.

Preliminary decree for sale.—A suit for sale of mortgaged property can only be brought where the mortgage is an English mortgage or a simple mortgage, or where the property is subject to a charge within the meaning of s. 100 of the Transfer of Property Act (see r. 15 below). The preliminary decree to be passed in a suit for sale corresponds to the preliminary decree in a suit for foreclosure in all respects except that instead of a direction providing for foreclosure the decree contains a direction providing for sale of the mortgaged property. As regards interest it is to be noted that the present rule expressly provides for interest *subsequent* to the date fixed for payment. There is no such provision in r. 2 (foreclosure-suit).

(1) *Ladu v. Babaji* (1883) 7 Bom. 532.

Power to decree sale in foreclosure suit.—This power will generally be exercised where there are several mortgages of the same property. In such a case it is clear that the rights of the several mortgagees can be better adjusted by means of a sale. See Conveyancing Act, 1881 [44 and 45 Vict., c. 41], s. 25.

O. 34,
rr. 4, 5.

5. [Act 4 of 1882, s. 80.] (1) Where on or before the day fixed the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required,

(b) ordering him to retransfer the mortgaged property, as directed in the said decree,

and also, if necessary,

(c) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in rule 4.

Final decree for sale: Limitation.—An application for a final decree for foreclosure, sale, or redemption is now governed by art. 181 of the Limitation Act, 1908, and the period of limitation is three years from the date on which the right to apply accrues (m).

Enlargement of time—This rule does not contain any provision such as is to be found in rr. 3 and 8 enabling the Court to extend the time for payment. This being so, when the money is not paid by the mortgagor by the day fixed in the decree, he cannot obtain an extension of the time for payment (n). But though the Court cannot extend the time for payment, the mortgagor is entitled to have the sale stopped under O. 21, r. 69, by payment of the amount due and costs at any time before sale and, if the property is sold, to recover it back by making the deposit required under O. 21, r. 89. The reason is that the provisions of the Code relating to the execution of decrees apply to sales under mortgage decrees.

(m) *Munna Lal v. Sarai Chunder* (1914) 42 I. A. 88; *Madho Ram v. Nihal Singh* (1916) 38 I. A. 21. | (n) *Tamiram v. Gujanan* (1900) 24 Bom. 300

O. 34, r. 6.

6. [Act 4 of 1882, s. 90.] Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount.

Recovery of balance due
on mortgage.

Decree against mortgagor personally.—Where after the sale of the mortgaged property there is still a balance due to the mortgagee and that amount is legally recoverable from the mortgagor, the mortgagee can ask for and obtain a decree under this rule for realization of the balance from other properties of the mortgagor (o). A decree under this rule is a decree to be passed in the original suit and not in a fresh suit (p). The object of the rule is to obviate the necessity of the mortgagee having to bring a fresh suit to recover the balance (q). Such a suit, in fact, could not be brought except where the mortgagee had reserved his right to do so with the leave of the Court under O. 2, r. 2 (r). It is hardly necessary to add that a personal decree under this rule cannot be passed until after sale of the mortgaged properties directed to be sold under r. 4 and 5. It is a condition precedent to an application under this rule that the whole of the mortgaged property comprised in the decree for sale has been sold and that the net proceeds are insufficient to discharge the mortgage. It is therefore improper and irregular to include in a decree for sale a direction that the balance remaining due after the mortgaged property has been sold shall be recoverable from the mortgagor personally. The original decree should merely reserve to the mortgagee liberty to apply for a decree under this rule (s). But if the decree for sale includes a direction such as the above, the decree though irregular, is within the competency of the Court and binding on the parties (t).

"Legally recoverable."—No decree can be passed for the balance under this rule, unless the balance is *legally recoverable*. The balance would not be legally recoverable, if where the plaintiff was relying on his personal remedy against the defendant, his suit for the personal remedy was barred by limitation, that is, if the suit were brought after the expiration of six years (u) from the due date of payment. Thus if the suit for sale is brought *ten years* after the due date of payment no decree can be passed under this rule for the balance. But if the suit for sale is brought within six years from the due date of payment, a personal decree may be passed for the balance, though the application under this rule is made more than six years after the due date of payment (v).

If instead of postponing the passing of the personal decree until after the mortgaged property is sold, a composite decree is passed containing a direction that the balance remaining due after the sale shall be recoverable from the mortgagor

(o) *Sonotun Shah v. Ali Nawaz* (1889) 10 Cal. 423.

(p) *Raj Singh v. Parmannand* (1889) 11 All. 485;

Musacheb v. Inayat-ul-lah (1892) 14 All. 513.

(q) *Mallikarjunadu v. Shivamurti* (1902) 25 Mad. 244, 285.

(r) *Ibid.*, p. 287.

(s) *Lal Behary Singh v. Habibur Rahman* (1899) 26 Cal. 166;

Rana Rajini v. Indra Narain (1900) 33 Cal. 890;

Damodar v. Vyanku (1907) 31 Bom. 244;

Badri Das v. Inayat Khan (1900) 22 All. 404.

(t) *Dinabhandu v. Mashuda* (1912) 16 C. L. J. 318.

(u) Limitation Act, art. 116, *Musacheb Zaman v. Inayat-ul-lah* (1892) 14 All. 513, 518;

Ram Din v. Kalka (1885) 7 All. 5 (2, 12 I. A. 12);

Miller v. Runga Nath (1896) 12 Cal. 389;

Gulam Hussein v. Mahomedalli (1910) 34 Bom. 540.

(v) *Hamid-ud-din v. Kedar Nath* (1898) 20 All. 386;

Challar Mal v. Thakurs (1898) 20 All. 512;

Jang Singh v. Chandar Mol (1906) 30 All. 388;

Rahmat Karim v. Abdul Karim (1907) 34 Cal. 672.

personally, the decree-holder has under s. 48 twelve years for the recovery of such balance reckoned from the date when it is ascertained (10). **O. 34, rr. 6, 7.**

7. [Act 4 of 1882, s. 62.] In a suit for redemption if the plaintiff succeeds, the Court shall pass a decree—

Preliminary decree in redemption-suit

- (a) ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next herein after referred to, or
- (b) declaring the amount so due at the date of such decree,

and directing—

- (c) that, if the plaintiff pays into Court the amount so due on a day within six months from the date of declaring in Court, the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff in possession of the property, but
- (d) that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all right to redeem or (unless the mortgage is by conditional sale) that the mortgaged property be sold.

Preliminary decree for redemption — This rule, excepting cl. (d), corresponds with r. 2 above which relates to a preliminary decree for foreclosure. The notes to that rule apply *mutatis mutandis* to this rule.

(10) *Aiyasamiar v. Venkatachela* (1917) 40 Mad. 980 [F B]

O. 34, r. 8.

8. [Act 4 of 1882, s. 93.] (1) Where on or before the day fixed, the plaintiff pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

Final decree in redemption-suit. (a) ordering the defendant to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required,

(b) ordering him to re-transfer the mortgaged property as directed in the said decree,

and, also, if necessary,

(c) ordering him to put the plaintiff in possession of the property.

(2) Where such payment is not so made, and the mortgage is not simple or usufructuary, the Court shall, on application made in that behalf by the defendant, pass a decree that the plaintiff and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the plaintiff to put the defendant in possession of the property.

(3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged.

(4) Where such payment is not so made, and the mortgage is not by conditional sale, the Court shall, on application made in that behalf by the defendant, pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance (if any) be paid to the plaintiff or other persons entitled to receive the same :

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time, postpone the day fixed for payment.

Power to enlarge time.

Sub-rule (1); decree for mortgagor.—Sub-rule (1) of this rule corresponds with sub-rule (1) of rules 3 and 5.

O. 34,
rr. 8-10.

Application for sale by mortgagor.—There is nothing to preclude a mortgagor, in a suit for redemption of a mortgage in which he fails to pay the mortgage amount according to the decree, from himself applying for a decree for sale. Sub-rule (4), while enabling the mortgagee [defendant] to apply for such a decree, does not take away the right of the mortgagor to ask for such a decree. If it were otherwise, a mortgagee may not apply for sale, in which case the relation of mortgagor and mortgagee would continue until the mortgagee chose to apply for sale (x).

Power to enlarge time.—The proper Court to which the application for enlargement of time should be made is the Court of first instance, even though the preliminary decree for redemption was passed by the Court of Appeal (y).

The proviso as to enlargement of time applies even if the suit is originally one for sale, provided the decree provides not only for sale, but for redemption of a prior mortgage. A mortgages his property first to B, and next to C. C sues A and B for a sale of the property. A decree is passed providing for redemption of B's mortgage by C, and for sale. The decree is a decree for redemption as between B and C, and the Court may allow further time to C for redemption upon good cause shown (z).

9. Notwithstanding anything hereinbefore contained, if it appears, upon taking the account referred to in rule 7, that nothing is due to the defendant or that he has been overpaid, the Court shall pass a decree directing the defendant, if so required, to retransfer the property and to pay to the plaintiff the amount which may be found due to him; and the plaintiff shall, if necessary, be put in possession of the mortgaged property.

Decree where nothing is found due or where mortgagee has been overpaid.

Scope of the rule.—This rule is new. It provides for cases where nothing is found due to the mortgagee and for cases where the mortgagee has been overpaid as may well happen where he is in possession. There was no such provision in the Transfer of Property Act, but the practice followed under that Act was the same as that prescribed by this rule.

10. [Act 4 of 1882, s. 94.] In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure or sale or redemption, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure or sale or redemption up to the time of actual payment.

Costs of mortgagee subsequent to decree.

(x) *Govinda v. Veeran* (1911) 30 Mad. 32. 390; *Dharmaraja v. Srinivasa* (1915) 30 Mad. 876.
(y) *Ram Dhani v. Lalai Singh* (1909) 31 All. 328; *Beni Prasad v. Harman Das* (1917) 39 All. (2) *Kaliam v. Sadho Lai* (1912) 35 All. 116.

O. 34. **Costs subsequent to decree.**—This rule provides for costs incurred by the
rr. 10-13. mortgagee subsequent to the decree. See the first part of rr. 3, 5 and 8.

✓ **11.** Where property is mortgaged for successive debts to successive mortgagees, any mesne mortgagee may institute a suit to redeem the interests of the prior mortgagee and to foreclose the rights of those that are posterior to himself and of the mortgagor.

Right of mesne mortgagee to redeem and foreclose.

Scope of the rule—This rule is new. It has been inserted in compliance with the suggestion of the Judicial Committee in the undermentioned case (a).

12. [Act 4 of 1882, s. 96.] Where any property the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

Sale of property subject to prior mortgage.

Sale of property subject to prior mortgage.—A puisne mortgagee may sue for foreclosure or sale without making the prior mortgagee a party to the suit [see the Explanation to r. 1]. In such a case, as also where the prior mortgagee is joined as a party and his mortgage is admitted (b), the prior mortgagee may consent to the property being sold free from his mortgage, in which case he acquires the right to have his claim satisfied first out of the proceeds of the sale of the mortgaged property [see r. 13 below].

13. [Act 4 of 1882, s. 97.] (1)
 Application of proceeds. Such proceeds shall be brought into Court and applied as follows :—

first. in payment of all expenses incident to the sale or properly incurred in any attempted sale ;

secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs properly incurred in connection therewith ;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made ;

(a) *Gopi Narain Khanna v. Danvedhar* (1905) 27 All. 325, 32 I. A. 123. | (b) *Srinawa v. Yamunabhai* (1906) 29 Mad. 84.

fourthly, in payment of the principal money due on account of that mortgage; and O. 34,
rr. 13, 14.

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 57 of the Transfer of Property Act, 1882.

14. [Act 4 of 1882, s. 99.] (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2.

Suit for sale necessary for bringing mortgaged property to sale.

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882, has not been extended.

Scope and object of the rule.—This rule provides that where a mortgagee has obtained a *personal* decree against the mortgagor on the *mortgage-debt*, he shall not be entitled to bring the *mortgaged property* to sale in *execution of the decree*; he can have the property sold only by instituting a *regular suit for sale* (e) and obtaining a decree for sale under rules 4 and 5. It is clear that where a mortgagee brings a regular suit for sale, the mortgagor is ordinarily given a period of 6 months within which to redeem the property (see r. 4). While in the other case where the suit is not for sale, but on the mortgage-debt only, the mortgagor is not entitled to any time at all. The object of the present rule is to prevent mortgagees from depriving the mortgagor of the right of redemption that would be given to him by the decree for sale (d) [see r. 4 above]. A mortgages his property to B to secure payment of Rs. 5,000 lent to him by B. B sues A to recover Rs. 5,000, and obtains a personal decree against A. B then applies for attachment and sale of A's interest in the mortgaged property in execution of the decree. The property may be *attached*, for there is nothing in this rule to bar the attachment (e), but, the *sale* must be refused under this rule. B cannot bring the property to sale except by means of a regular suit for sale.

(c) See Transfer of Property Act, 1882, s. 67.

(d) See *Khairamji v. Datta* (1903) 32 Cal. 206, 32 I. A. 25.

(e) *Chandra Nath v. Burroda* (1895) 22 Cal. 813; *Nadhabhai v. Bai Ujan* (1908) 32 Bom. 205.

O. 34, rr. 14, 15. **Effect of sale made in contravention of the rule.**—It was at one time thought that a sale made in contravention of this rule was absolutely void. But this view is no longer tenable and it has been held in recent cases that a sale in contravention of this rule is not void, but voidable at the instance of the mortgagor or other persons interested in the equity of redemption (*f*). The sale, in other words, is valid until it is set aside. The procedure to set aside the sale is by way of application under s. 47; a separate suit is barred under that section.

15. [Cf. Act 4 of 1882, s. 100.] All the provisions contained in this Order as to the sale or redemption of mortgaged property shall, so far as may be, apply to property subject to a charge within the meaning of section 100 of the Transfer of Property Act, 1882.

Charge.

Charge.—Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property [Transfer of Property Act, s. 100].

ORDER XXXV.

Interpleader.

O. 35, rr. 1, 2. **1.** In every suit of interpleader the plaintiff shall, in addition to the other statements necessary for plaints, state—

Plaint in interpleader suit.

- (a) that the plaintiff claims no interest in the subject-matter in dispute other than for charges or costs;
- (b) the claims made by the defendants severally; and
- (c) that there is no collusion between the plaintiff and any of the defendants.

Interpleader suits.—See s. 88 and notes thereto.

2. Where the thing claimed is capable of being paid into Court or placed in the custody of the Court the plaintiff may be required to so pay or place it before he can be entitled to any order in the suit.

Payment of thing claimed into Court.

(f) *Khairajmal v. Daim* (1905) 32 Cal. 296, 32 I. A. 23; *Ashvotoshi v. Behari Lal* (1908) 35 Cal. 61

Rishan Lal v. Umrao Singh (1908) 30 All. 146.

3. Where any of the defendants in an interpleader suit is actually suing the plaintiff in respect of the subject-matter of such suit,

Procedure where defendant is suing plaintiff.

the Court in which the suit against the plaintiff is pending shall, on being informed by the Court in which the interpleader suit has been instituted, stay the proceedings as against him; and his costs in the suit so stayed may be provided for in such suit; but if, and in so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader suit.

O. 35,
rr. 3-5.

Procedure at first hearing.

4. (1) At the first hearing the Court may—

(a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit; or

(b) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit.

(2) Where the Court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed.

(3) Where the admissions of the parties do not enable the Court so to adjudicate, it may direct—

(a) that an issue or issues between the parties be framed and tried, and

(b) that any claimant be made a plaintiff in lieu of, or in addition to the original plaintiff,

and shall proceed to try the suit in the ordinary manner.

5. Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with

Agents and tenants may not institute interpleader suits.

any persons other than persons making claim through such principles or landlords.

O. 35,
rr. 5, 6.

Illustrations.

(a) *A* deposits a box of jewels with *B* as his agent. *C* alleges that the jewels were wrongfully obtained from him by *A*, and claims them from *B*. *B* cannot institute an interpleader-suit against *A* and *C*.

(b) *A* deposits a box of jewels with *B* as his agent. He then writes to *C* for the purpose of making the jewels a security for a debt due from himself to *C*. *A* afterwards alleges that *C*'s debt is satisfied, and *C* alleges the contrary. Both claim the jewels from *B*. *B* may institute an interpleader-suit against *A* and *C*.

Interpleader suit by agents.—In ill. (n), *C* does not claim through *A* (principal), but *adversely* to him; hence no interpleader-suit can be brought. In ill. (h), *C* claims *through A*; hence *B* may institute an interpleader-suit against *A* and *C*.

Interpleader suit by tenants.—*A* lets certain lands to *B*. *C* alleges that the lands never belonged to *A*, and claims the rent from *B*. *B* cannot institute an interpleader-suit against *A* and *C*; the reason is that *C* claims *adversely* to *A* (landlord). But if *C* claims the rent, alleging that the lands were sold to him by *A* after the same were let to *B*, *B* may institute an interpleader-suit against *A* and *C*; the reason is that in this case *C* claims *through A*; that is, as purchaser from *A*. The result is that an interpleader-suit by a tenant can only be maintained if the defendant other than the landlord claims *through* the landlord (*g*). The following is a peculiar case. *A* grants a perpetual lease of certain villages to his wife *B*. *B* sub-lets the villages to *C*. *A* alleging that the lease granted by him to *B* was executed by him *benami* in the name of *B*, gives notice to *C*, claiming the rents of the villages. *B* denies that the transaction was *benami*, and she also claims the rents from *C*. *C* can maintain an interpleader suit against *A* and *B*. The reason given is that *A* claims *through B* (*h*). See Indian Evidence Act, s. 116.

6. Where the suit is properly instituted the Court may provide for the costs of the original plaintiff by giving him a charge on the thing claimed or in some other effectual way.

Charge for plaintiff's costs.

ORDER XXXVI.

Special Case.

O. 36, r. 1. 1. (1) Parties claiming to be interested in the decision of any question of fact or law may enter into an agreement in writing stating such question in the form of a case for the opinion of the Court, and providing that, upon the finding of the Court with respect to such question,—

Power to state case for Court's opinion.

(g) *Shelley Bonnerjee v. Raj Chandra Datt* (1910) 37 Cal. 552. | (h) *Orr v. Chidambaram* (1909) 33 Mad. 220.

- (a) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them; or
- (b) some property, moveable or immovable, specified in the agreement, shall be delivered by one of the parties to the other of them; or
- (c) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement.

O. 36,
rr. 1-4

(2) Every case stated under this rule shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and specify such documents as may be necessary to enable the Court to decide the question raised thereby.

2. Where the agreement is for the delivery of any property, or for the doing, or the refraining from doing, any particular act, the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement.

Where value of subject matter must be stated

3. (1) The agreement, if framed in accordance with the rules hereinbefore contained, may be filed in the Court which would have jurisdiction to entertain a suit, the amount or value of the subject-matter of which is the same as the amount or value of the subject matter of the agreement.

Agreement to be filed and entered in suit

(2) The agreement when so filed, shall be numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff or plaintiffs, and the other or the others of them as defendant or defendants; and notice shall be given to all the parties to the agreement, other than the party or parties by whom it was presented.

4. Where the agreement has been filed, the parties to it shall be subject to the jurisdiction of the Court and shall be bound by the statements contained therein.

Parties to be subject to court's jurisdiction

O. 36, r. 5.

5. (1) The case shall be set down for hearing as a suit instituted in the ordinary manner, and the provisions of this Code shall apply to such suit so far as the same are applicable.

Hearing and disposal of case.

(2) Where the Court is satisfied, after examination of the parties or after taking such evidence as it thinks fit,—

(a) that the agreement was duly executed by them,

(b) that they have a *bonâ fide* interest in the question stated therein, and

(c) that the same is fit to be decided,

it shall proceed to pronounce judgment thereon, in the same way as in an ordinary suit, and upon the judgment so pronounced a decree shall follow.

ORDER XXXVII.

Summary Procedure on Negotiable Instruments.

O. 37,
rr. 1, 2.

Application of Order.

1. This Order shall apply only to—

(a) the High Courts of Judicature at Fort William, Madras and Bombay ;

(b) the Chief Court of Lower Burma ;

(c) the Court of the Judicial Commissioner ;
and

(d) any other Court to which sections 532 to 537 of the Code of Civil Procedure, 1882, have been already applied.

2. (1) All suits upon bills of exchange, hundis or promissory notes may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed but the summons shall be in Form No. 4 in Appendix B or in such other form as may be from time to time prescribed.

Institution of summary suits upon bills of exchange, etc.

(2) In any case in which the plaint and summons are O. 37, r. 2. in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter provided so to appear and defend; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons, together with interest at the rate specified (if any) to the date of the decree, and such sum for costs as may be prescribed, unless the plaintiff claims more than such fixed sum, in which case the costs shall be ascertained in the ordinary way, and such decree may be executed forthwith.

Points of difference between a summary suit and a suit brought in the ordinary manner on negotiable instruments:—

- (1) A plaintiff proposing to sue upon a negotiable instrument may either bring a *summary* suit or he may bring a suit in the *ordinary* manner. The advantage of a summary suit is that the defendant is not, as in a suit brought in the ordinary manner, entitled as of right to defend the suit. The defendant in a summary suit must *apply for leave* to defend within 10 days from the service of the summons upon him (see Limitation Act, 1908, sch. I, art. 159) and such leave will be granted only if the affidavit filed by the defendant discloses such facts as would make it incumbent on the plaintiff to prove consideration, or such other facts as the Court may deem sufficient for granting leave to the defendant to appear and defend the suit. If no leave to defend is granted, the plaintiff is entitled to a decree.
- (2) A summary suit must be brought within 6 months from the date on which the debt becomes due and payable (Limitation Act, 1908, sch. I, art. 5). The period of limitation for a suit brought in the ordinary manner on a negotiable instrument is 3 years.
- (3) A summary suit can only be brought in the Courts mentioned in r. 1.

A **negotiable instrument** means a promissory note, bill of exchange, or cheque, expressed to be payable to a specified person or his order, or to the order of a specified person or to the bearer thereof, or to a specified person or the bearer thereof (Negotiable Instruments Act, 26 of 1881, s. 13).

Form of summons in a summary suit.—The summons in such a suit requires the defendant to obtain leave from the Court within 10 days from the service thereof to appear and defend the suit and within such time to cause an appearance to be entered on his behalf. The Court has no power, after the time fixed by the summons for obtaining leave to appear and defend has expired, to extend the time (i).

“Unless he obtains leave.”—See r. 3 below.

(i) *Mahmud v. Saraf Chandra* (1900) 5 Cal. W. N. 259.

O. 37,
rr. 2-5.

"Together with interest at the rate specified (if any)"—In a suit under this Order the plaintiff is not entitled to recover any interest, unless the interest is specified in the promissory note itself (j).

"The allegations in the plaint shall be deemed to be admitted."—The effect of those words is to enable the plaintiff to succeed on his own allegations, though the allegations may be of such a nature that if the defendant appeared and denied them, they would have to be proved by the plaintiff.

3. (1) The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application.

Defendant showing defence on merits to have leave to appear.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit.

Limitation.—The application for leave to appear and defend must be made within 10 days from the date of service of the summons on the defendant. The date shown in the Sheriff's return as the date of service is the only date to which reference could be made to determine the question of limitation arising on an application under this section (k).

4. After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.

Power to set aside decree.

5. In any proceeding under this Order the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof.

Power to order bill, etc., to be deposited with officer of Court.

(j) *Bhupati v. Sourendra* (1903) 30 Cal. 448.

(k) *Madhub Lall v. Woopendranarain* (1890) 23

Cal. 573.

6. The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance, or non-payment, or otherwise, by reason of such dishonour, as he has under this Order for the recovery of the amount of such bill or note.

O. 37,
rr. 6, 7.

Recovery of cost of noting non-acceptance of dishonoured bill or note

7. Save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner.

Procedure in suit

ORDER XXXVIII.

Arrest and attachment before Judgment.

Arrest before Judgment.

1. Where at any stage of a suit, other than a suit of the nature referred to in section 16, clauses (a) to (d), the Court is satisfied, by affidavit or otherwise,—

O. 38, r. 1.

Where defendant may be called upon to furnish security for appearance

(a) that the defendant, with intent to delay the plaintiff, or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against him,—

(i) has absconded or left the local limits of the jurisdiction of the Court, or

(ii) is about to abscond or leave the local limits of the jurisdiction of the Court, or

(iii) has disposed of or removed from the local limits of the jurisdiction of the Court his property or any part thereof, or

(b) that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby be

O. 38,
rr. 1-3.

obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance :

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim ; and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court.

Scope of the order.—Order 21 deals with the arrest of a judgment-debtor and the attachment of his property *in execution of a decree* passed against him. The present Order lays down rules for the arrest of a defendant and the attachment of his property *before judgment*. The object of these rules is to secure the plaintiff against any attempt on the part of the defendant to defeat the execution of any decree that may be passed against him.

Consequences of obtaining arrest on insufficient grounds—See s. 95.

2. (1) Where the defendant fails to show such cause the Court shall order him either to deposit
Security. in Court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to the last preceding rule.

(2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

3. (1) A surety for the appearance of a defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation.
Procedure on application by surety to be discharged.

(2) On such application being made, the Court shall summon the defendant to appear or, if it thinks fit, may issue a warrant for his arrest in the first instance.

(3) On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security.

O. 38,
rr. 3-5.

4. Where the defendant fails to comply with any order under rule 2 or rule 3, the Court may commit him to the civil prison until the decision of the suit, or, where a decree is passed against the defendant, until the decree has been satisfied :

Procedure where defendant fails to furnish security or find fresh security.

Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees.

Provided also that no person shall be detained in prison under this rule after he has complied with such order.

Attachment before Judgment.

5. (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—

Where defendant may be called upon to furnish security for production of property.

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security,

O. 38,
rr. 5-7. (2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

Object of the rule.—The main object of an attachment before judgment is to enable the plaintiff to realize the amount of the decree, supposing a decree is eventually passed, from the defendant's property (1).

"Is about to dispose of the whole or any part of his property."—The expression "property" includes property of every description whether moveable or immovable (m). The expression "his property" refers to the property of the defendant. It does not refer to property which is the joint property of the plaintiff and the defendant. Thus where A sued B for partnership accounts, and applied for an attachment before judgment of the *partnership* property on the allegation that B was about to dispose of the same it was held that the case was not one for an attachment before judgment, but for the appointment of a receiver under O. 40 below (n).

Effect of vesting order on attachment before judgment.—See notes to r. 10 below under the same head.

6. (1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient, to satisfy any decree which may be passed in the suit, be attached.

Attachment when cause not shown or security not furnished.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

"Property specified."—That is, the property specified by the plaintiff as required by r. 5, sub-r. (2). Such property may be within the jurisdiction of the Court or it may be outside the jurisdiction.

7. Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of the decree.

Mode of making attachment.

(1) *Ganu Singh v. Jangji Lal* (1899) 26 Cal. 531, at p. 533. | (n) *Dasmadar v. Panalal* (1907) 9 Bom. L. R. 540.
(m) *Chedi Lal v. Kuwarji* (1897) 17 All. 82.

8. Where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money. O. 38,
rr. 8-10.

9. Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed.

10. Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

Effect of vesting order on attachment before judgment — Attachment before judgment does not confer any priority as against the Official Assignee, though the plaintiff at whose instance the attachment was made may ultimately obtain a decree in the suit. *A* sues *B* and attaches *B*'s property before judgment. A decree is then passed for *A*. Between the date of the attachment and the date of the decree *B*'s property vests in the Official Assignee under a vesting order. The Official Assignee applies to the Court for removal of the attachment on the ground that the property has vested in him. *A* contends that the attachment being prior to the date of the vesting order, his claim has a priority over that of the Official Assignee. *A*'s contention will not be upheld, and the attachment will be removed (o).

Attachment before judgment not to affect rights of persons not parties to the suit — *A* and *B* are members of a joint Hindu family. *C* sues *A*, and obtains an attachment before judgment of *A*'s interest in the joint family property. *A* dies after the decree. *A*'s interest in the property passes by survivorship to *B* and *C* is not entitled to have *A*'s share sold in execution of the decree (p).

Attachment before judgment not to bar rights of other decree-holders — *A* institutes a suit against *B*, and obtains an attachment before judgment of *B*'s property. Subsequently *C*, another creditor of *B*, obtains a decree against *B*. *C* is entitled to have the property attached and sold in execution of his decree. The attachment before judgment does not confer any right upon *A* to have his decree satisfied in priority to that of *C* (q).

(o) *Shib Kristo v. Miller* (1884) 10 Cal. 150; *Turner v. Pestonji Fardunji* (1890) 20 Bom. 403; *Krishnaswamy v. Official Assignee of Madras* (1108) 28 Mad. 673.

(p) *Subbarao v. Mahadevi* (1913) 38 Bom 105.
(q) *Bisheshar Das v. Ambika* (1915) 37 A.L. 575.

O. 38,
rr. 11, 12.

11. Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property.

~~Property attached before judgment not to be re-attached in execution of decree.~~

Scope of the rule.—The object of this rule is merely to take away the necessity for a re-attachment of the property. It does not exempt the plaintiff, when a decree follows the attachment, from making the usual application for execution under O. 21, r. 11 (2) (r). Nor does the rule give the decree-holder at whose instance the property was attached before judgment any right to preferential treatment over other decree-holders who may have applied for a rateable distribution under s. 73 (e).

12. Nothing in this Order shall be deemed to authorize the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce.

~~Agricultural produce not attachable before judgment.~~

ORDER XXXIX.

Temporary Injunctions and Interlocutory Orders.

Temporary Injunctions.

O. 39, r. 1. ~~Cases in which temporary injunction may be granted.~~

1. Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
- (b) that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors,

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders.

(r) *Palloni v. Jordan* (1988) 12 Bom. 400; 34 Mad. 25.
Arunachellam v. Ilaij Sheek Meera (1910) | (e) *Savadut Roy v. Sree Canto* (1906) 33 Cal. 644.

Temporary and perpetual injunctions.—Injunctions are of two kinds, temporary O. 39, r. 1. and perpetual. Temporary injunctions are regulated by rr. 1 and 2 of this Order: perpetual injunctions are regulated by ss. 55-57 of the Specific Relief Act I of 1877. A party against whom a perpetual injunction is granted is thereby restrained for ever from doing the act complained of. A perpetual injunction can only be granted by final decree made at the hearing and upon the merits of the suit. A temporary or *interim* injunction, on the other hand, may be granted on an *interlocutory application* at any period of the suit. The injunction is called *temporary*, for it is granted until the suit is disposed of or until the further order of the Court(i). Thus if A's neighbour commences to erect on a plot of land belonging to him a building which, if completed, would obstruct the access of light and air enjoyed by A over the said plot to the windows of his building in respect of which he claims an easement, he (A) may sue his neighbour for a *perpetual* injunction restraining him from building so as to disturb the easement claimed by him (A), and may at any time after the institution of the suit apply to the Court under the present rule for a *temporary* injunction restraining the defendant from building until the suit is disposed of. Interference with A's easement is an "injury" within the meaning of r. 2 below.

Principles governing temporary injunctions.— "The granting of a temporary injunction under the powers conferred by this [rule] is a matter of discretion. True it is a matter of judicial discretion. But if the Court which grants the injunction rightly appreciates the facts and applies to those facts the true principles, then that is a sound exercise of judicial discretion" (u). One of those principles is that the Court in granting a temporary injunction should first see that there is a *bona fide* contention between the parties, and then, on which side, in the event of success, will lie the balance of inconvenience if the injunction does not issue (v). Or, as stated in the judgment of Cotton, L.J., in *Preston v. Luck* (w), to entitle a plaintiff to an interlocutory injunction the Court should be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that the plaintiff is entitled to relief. The real point, upon an application for a temporary injunction, is not how the question ought to be decided at the hearing of the case, but whether there is a substantial question to be investigated and whether matter should not be preserved *status quo* until that question can be finally disposed of (x). Another principle is that where a perpetual injunction is sued for, and the plaintiff applies for a temporary injunction, the Court should grant a temporary injunction if the effect of not granting such an injunction will be to deprive the plaintiff for ever of the right claimed by him in the suit (y). See notes to r. 3. "Principles governing temporary injunction to restrain breach of contracts."

"Property in dispute in a suit."—Note that the property in respect of which an injunction may be granted under cl. (a) of this rule must be the property in dispute in the suit, and no other.

"Property in danger of being wrongfully sold in execution of a decree."

—Certain property attached in execution of a decree obtained by A against B is notified for sale at the instance of A. C, alleging that the property belongs to him and not to B, sues A and B for a declaration of his title to the property, and applies for an injunction under this rule to restrain A from bringing the property to sale until the suit is disposed of. Has the Court power to grant the injunction under this rule? Yes, for the case

(b) Specific Relief Act, 1877, s. 53.

(c) *Per White, C.J., in Subba v. Haji Badsha* (1903) 26 Mad. 168, 174.

(e) *Doherty v. Allaman* (1878) 3 App. Cas. 700; *Subba v. Haji Badsha* (1903) 26 Mad. 168,

175.

(w) (1884) 27 C. D. 497, 506.

(x) *Israel v. Shamsar* (1913) 41 Cal. 436, 442-443.

(y) *Nanabhai v. Janardhan* (1888) 12 Bom. 110.

O. 39, is one in which the property in dispute in the suit is "*in danger* of being wrongfully sold
rr. 1, 2. in execution of the decree."

Power of High Court to "stay the hearing" of a suit pending in Subordinate Court—It has been recently held by a Full Bench of the Bombay High Court that a Chartered High Court has power to make an order directing a Subordinate Court not to proceed further with a suit pending in the latter Court, but that such an order appertains to the *Appellate*, and not the *Original* Side of the High Court, and that it can therefore only be made by those Judges to whom the Appellate Side work is assigned by Rules made under s. 13 of the Charter Act, that is, by a Division Court consisting of two Judges, and that it cannot be made by a single Judge sitting on the Original Side of the High Court (2).

2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may, by order, grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

(3) In case of disobedience, or of breach of any such terms the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.

(4) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

Scope of the rule.—Rule 1 enables the Court to grant temporary injunctions in the cases specified in cls. (a) and (b) thereof. The present rule enables the Court to grant temporary injunctions to restrain a defendant from committing the breach of a contract, or other injury of *any kind*, e.g., trespass.

(2) *Narayan v. Jankibai* (1915) 39 Bom. 604.

Principles governing temporary injunction to restrain breach of contract.—*Temporary injunctions* to restrain the breach of a contract are regulated by the present rule. *Perpetual injunctions* to restrain the breach of a contract are regulated by the Specific Relief Act, 1877, s. 56, cl. (f), and s. 57. Section 56, cl. (f), of the Specific Relief Act, provides that a perpetual injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced. The performance of a contract cannot be specifically enforced in those cases where *damages* would afford adequate relief, and hence no temporary injunction can be granted as a rule in such cases. "The very first principle of injunction law is that you do not obtain injunctions for actionable wrongs [or for breach of contracts] for which damages are the proper remedy" (a).

The following two rules govern all the cases on the subject in hand:—

1. If a suit is brought for specific performance of a contract and for an injunction to restrain the defendant from committing a breach of the contract, and the plaintiff applies for a temporary injunction to prevent the breach of the contract until the suit is disposed of, the Court will decline to grant a temporary injunction, if the plaint and the affidavits filed by the parties show on the face of them that the case is not one for a perpetual injunction or for specific performance. The refusal of the application for a temporary injunction in *Gurpat v. Rajan Koor* (b) may be referred to this rule. In that case the parties were Hindus and the suit was brought by A against B for specific performance of a contract whereby B agreed to give his minor daughter in marriage to A. A applied for an interim injunction to restrain B from giving away the girl in marriage to another person to whom B was about to marry the girl; but the application was refused on the ground that the agreement was not one of which specific performance could be enforced or the breach of which could be restrained by a perpetual injunction.

2. The converse of rule (1) is not always true; that is, the Court will not grant a temporary injunction before the hearing in every case where a perpetual injunction might fitly be granted at the hearing; for to justify a temporary injunction, not only must the case be such that an injunction is the appropriate relief. But there must be the further ingredient that unless the defendant is restrained forthwith by a temporary injunction, irreparable injury or inconvenience may result to the plaintiff before the suit is decided upon its merits (c). But if a case is a proper one for specific performance, and irreparable injury is likely to be caused to the plaintiff unless the breach of the contract is forthwith restrained, the Court will grant a temporary injunction to restrain the breach of the contract. Thus where A sued B for specific performance of a contract whereby in consideration of A having advanced money to B for working certain mica mines, B agreed to deliver all the mica produce from the mines to A, and not to deliver any portion thereof to any other person, and also for an injunction to restrain the breach thereof and applied for a temporary injunction to restrain B from delivering any portion of the mica to another firm to whom B had arranged in breach of his contract to consign a portion, the Court held that the case was a fit one for a temporary injunction, and the injunction was granted (d).

Sub-rule (3).—The Court has power under this sub-rule to order either the arrest of the party or attachment of his property. The Court is not bound in the first instance to attach and then only order imprisonment (e).

(a) *Per Lindley, L.J., in London and Blackwall Ry. Co. v. Cross* (1880) 31 C. D. 354, 369.
(b) (1870) 1 Cal. 74.
(c) *Namabhai v. Janardhan* (1888) 12 Bom. 110.

(d) *Subba v. Hatti Nayana* (1903) 26 Mad. 168; *Madras Ry. Co. v. Rutt* (1891) 14 Mad. 18.
(e) *Ottaparakkal v. Sayid Akabi* (1910) 39 Mad. 907.

0. 39,
rr. 3-7.

3. The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction. direct notice of the application for the same to be given to the opposite party.

✓ Before granting injunction Court to direct notice to opposite party

4. Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.

Order for injunction may be discharged, varied or set aside.

5. An injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain.

Injunction to corporation binding on its officers.

Interlocutory Orders.

6. The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any moveable property, being the subject-matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once.

✓ Power to order interim sale.

The words "or which for any other just and sufficient cause it may be desirable to have sold at once" have been added so as to empower the Court to order a sale of securities where the state of the market requires such a course.

Detention, preservation inspection, etc., of subject-matter of suit

✓ 7. (1) The Court may, on the application of any party to a suit, and on such terms as it thinks fit.—

(a) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein :

(b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; and O. 39,
rr. 7-9.

(c) for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(2) The provisions as to execution of process shall apply, *mutatis mutandis*, to persons authorized to enter under this rule.

Inspection of property which is the subject-matter of the suit.—In a suit by A against B for damages for injury alleged to have been caused to A's house by the erection of B's house, the Court may make an order on B's application for inspection of A's house, to determine the alleged injury. A's house being in such a case "the subject-matter of the suit" (f).

8. (1) An application by the plaintiff for an order under rule 6 or rule 7 may be made after notice to the defendant at any time after institution of the suit.

✓ Application for such order to be after notice.

(2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance.

9. Where land paying revenue to Government, or a tenure liable to sale, is the subject-matter of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure,

When party may be put in immediate possession of land, the subject-matter of suit.

O. 39,
rr. 9, 10.

and the Court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

10. Where the subject-matter of a suit is money or some other thing capable of delivery and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security, subject to the further direction of the Court.

Deposit of money in Court.—Suppose *A* sues *B* to recover a sum of Rs. 5,000. Suppose *B* admits Rs. 4,000 to be due to *A*, and contests *A*'s claim as to the balance of Rs. 1,000. In such a case, *A* may apply to the Court to direct *B* to deposit Rs. 4,000 in Court, or to deliver the same to him (*A*).

ORDER XL.

Appointment of Receivers.

O. 40, r. 1. Appointment of receiver.

1. (1) Where it appears to the Court to be just and convenient the Court may by order—

- (a) appoint a receiver of any property, whether before or after decree ;
- (b) remove any person from the possession or custody of the property ;
- (c) commit the same to the possession, custody or management of the receiver ; and
- (d) confer upon the receiver all such powers as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the

rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit. O. 40, r. 1.

(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

A receiver is an officer of the Court.—"The object and purpose of the appointment of a receiver may generally be stated to be the preservation of the subject matter of the litigation pending a judicial determination of the rights of the parties thereto" (g). "The receiver is appointed for the benefit of all concerned; he is the representative of the Court and of all parties interested in the litigation, wherein he is appointed" (h).

Legal consequences arising from the fact that a receiver is an officer of the Court.—(1) Property in the hands of a receiver cannot be attached without the leave of the Court first obtained. Thus if a receiver is appointed of certain property in a suit between A and B, and C obtains a decree against A or B, C cannot in execution of his decree attach the property in the hands of the receiver without the leave of the Court; such an attachment is an interference with the Court's possession through its officer, the receiver (i).

(2) A receiver cannot sue or be sued except with the leave of the Court by which he was appointed receiver (j).

(3) If any loss is occasioned to the property by the wilful default or gross negligence of the receiver, the loss is to be borne not by the party on whose application the receiver was appointed (for a receiver is not an agent of such party), but by the estate in the first instance. The party damaged by the loss may then proceed against the receiver (k). See r. 4 below.

"Just and convenient."—These words have been taken from the Judicature Act, 1873, s. 25, sub-s. (8). The words in that Act are "just or convenient," but they have been construed to mean just *and* convenient (l). The words "just and convenient" do not mean that the Court is to appoint a receiver simply because the Court thinks it convenient; they mean that the Court should appoint a receiver for the protection of rights or for the prevention of injury according to legal principles (m). Hence the Court should not appoint a receiver of property in the possession of the defendant claiming the same by a legal title, unless the plaintiff can show *prima facie* that he has a strong case and a good title to the property (n). The mere circumstance that the appointment of a receiver will do no harm to any one is no ground for appointing a receiver (o).

(g) *Jugal Kishori Das v. Naba Gopal* (1907) 34 Cal. 305, 316.

(h) *Ib.*, p. 317.

(i) *Kain v. Ali Mahomed* (1892) 16 Bom. 577.

(j) *Mulla v. Ram Ranjan* (1884) 10 Cal. 1014; *Dunne v. Kumar Chandra* (1903) 30 Cal. 593; *Fink v. Corporation of Calcutta* (1903) 30 Cal. 721.

(k) *Orr v. Mulhia* (1894) 17 Mad. 501; *Mulhia*

v. Orr (1897) 20 Mad. 224.

(l) *Bedlow v. Bedlow* (1878) 9 C. D. 89, 93.

(m) *Holmes v. Millage* (1893) 1 Q. B. 551, 557.

(n) *Sidhuwari v. Abhogwari* (1888) 15 Cal. 313; *Chandulal v. Padmanand* (1895)

(1895) 22 Cal. 459.

(o) *Srimati v. Beni Madhab* (1895) 5 All. 556;

Horris v. Beauchamp [1894] 1 Q. B. 801.

O. 40, r. 1. Cases in which a receiver may be appointed.—*A* and *B* constitute members of a trading joint family. *A* sues *B* for partition of the joint family property, and applies for the appointment of a receiver on the ground that *B* has misappropriated large sums of money and thrown the accounts into confusion. Here it is *just and convenient* that a receiver should be appointed, for the object is the preservation of the property which is the subject of the suit (*p*). The removal of a large amount of property by the defendant under circumstances which might fairly give rise to suspicion during the pendency of a suit in which the question of title to that property would be determined, is a sufficiently strong ground for the appointment of a receiver (*q*). Likewise a receiver may be appointed of mortgaged property in a suit for foreclosure or sale, if a proper case is made out (*r*). A receiver may also be appointed in a testamentary suit (*s*).

Partnership suits.—In considering the question of the appointment of a receiver in partnership suits, a distinction has to be drawn between cases in which the contest is between partners and cases in which the contest is between partners on the one hand and non-partners on the other.

In the first class of cases, that is, where one partner seeks to have a receiver appointed against his co-partners, it is necessary to distinguish cases in which the partnership has already been dissolved from those in which the partnership is still subsisting. If the partnership is already dissolved, the Court usually appoints a receiver, almost as a matter of course (*t*). But if the partnership is still subsisting, no receiver will be appointed unless some special grounds for the appointment can be shown. There must be fraud or gross misconduct of some kind (*u*), or wilful denial of the complaining partner's right (*v*), or persistence under cover of right in conduct endangering the assets (*w*).

In the second class of cases, that is, where the contest is between partners on the one hand and non-partners on the other, *e.g.*, legal representatives of a late partner a receiver will not be granted *against a member of the firm* at the instance of the legal representatives, unless some special grounds for the interference of the Court can be established. But it is a matter of course to appoint a receiver where such appointment is sought by a partner *against the legal representatives* of his late co-partner, or where all the partners are dead, and an action is pending between their representatives (*x*).

Appeal.—An order of a Court that a receiver should be appointed without appointing any body by name and adjourning the case to a later date for so appointing one is an order under this rule, and is appealable under O. 43, r. 1, cl. (s) (*y*).

A receiver cannot delegate his powers to others.—Where a receiver is appointed to collect the rents of an estate, it is his duty to collect the rents himself, or where the rents are collected by a clerk on his behalf, to receive the rents and to keep proper accounts thereof. If the rents received by the clerk are misappropriated, the receiver is bound to make good the loss. He is not justified in delegating or entrusting to another a duty entrusted to him by the Court (*z*).

(*p*) *Hanumayya v. Venkatasubbayya* (1893) 18 Mad. 23.

(*q*) *Sia Ram v. Mohabir* (1900) 27 Cal. 279.

(*r*) *Ghanashyam v. Gobinda* (1902) 7 Cal. W. N. 452; *Jakkisowles v. Zenabai* (1890) 14 Bom. 431.

(*s*) *Yeswant v. Shankar* (1893) 17 Bom. 388.

(*t*) *Pini v. Roncoroni* (1892) 1 Th. 633.

(*u*) *Smith v. Jeyes* (1841) 4 Beav. 503.

(*v*) *Hale v. Hale* (1841) 4 Beav. 369.

(*w*) *Mudgwick v. Wimble* (1843) 6 Beav. 495.

(*x*) Lindley on Partnership, Book III, Chap. 10, sec. 8, sub-sec. 3 (of receivers).

(*y*) *Palaniappa v. Palaniappa* (1917) 40 Mad. 18.

(*z*) *Balaji v. Ramchandra* (1895) 19 Bom. 660.

2. The Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver. O. 40,
rr. 2-5.

Duties.

✓ 3. Every receiver so appointed shall—

- (a) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property ;
- (b) submit his accounts at such periods and in such form as the Court directs ;
- (c) pay the amount due from him as the Court directs ; and
- (d) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

Enforcement of receiver's duties.

4. Where a receiver—

- (a) fails to submit his accounts at such periods and in such form as the Court directs, or
- (b) fails to pay the amount due from him as the Court directs, or
- (c) occasions loss to the property by his wilful default or gross negligence,

the Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.

Legal representative of receiver.—Where loss has been occasioned by a receiver to the estate in his charge, and the receiver is dead, the Court may direct his property in the hands of his legal representatives to be attached and sold under this rule. This may be done by an application. It is not necessary to bring a regular suit. (a).

5. Where the property is land paying revenue to the Government, or land of which the revenue

When Collector may be appointed receiver.

has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property.

ORDER XLI.

Appeals from Original Decrees.

3. 41, r. 1. 1. (1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the appellate Court dispenses therewith) of the judgment on which it is founded.

Form of appeal. What to accompany memorandum.

(2) The Memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively.

Contents of memorandum.

Appeal from original decree.—See s. 96 and notes thereto.

Defective vakalatnam.—A memorandum of appeal cannot be said to be properly presented, if it is presented by a vakil whose name does not appear in the vakalatnama, though by an oversight. In such a case, the appeal should be dismissed even if the objection to its validity is taken at a very late stage of the proceedings (b).

Grounds of objection.—The grounds of objection must be such as arise from the pleadings and evidence, and are necessary for the decision of the case (c). The appellant must not be allowed in appeal to make out a new case (d), or a case inconsistent with the case set up by him in the lower Court (e). Nor can an appellate Court make out an entirely new case for a plaintiff which he never made himself at any period of the trial (f).

Grounds of objection which may be taken for the first time in appeal.—There are certain points which, though not taken in the lower Court, may yet be taken for the first time before the appellate Court. Thus an objection to the jurisdiction of the lower Court to entertain the suit may be taken for the first time in appeal (g). Similarly the plea of *res-judicata* may be taken for the first time in appeal, provided it can be decided upon the record before the Court (h).

Credibility of witnesses.—Generally speaking it is undesirable for an appellate Court to interfere with the findings of fact of the trial judge who sees and hears the witnesses and has an opportunity of noting their demeanour, especially in cases where the issue is simple and depends on the credit which attaches to one or other of conflicting witnesses. The view of the trial judge as to the credibility of witnesses should not be put aside on a mere calculation of probabilities by the appellate Court (i).

- (b) *Muhammad v. Jax Ram* (1913) 36 All. 46.
 (c) *Nazur Ally v. Ojoodhyarun* (1868) 10 M. I. A. 540, 558.
 (d) *Indur Chunder v. Radhakishore* (1892) 19 Cal. 507, 19 I. A. 90.
 (e) *Gajapati v. Vuswesa* (1892) 15 Mad. 503, 19 I. A. 170.

- (f) *Irattipouda v. Seshappa* (1833) 17 Bom. 772.
 (g) *Ramayya v. Subbarayudu* (1890) 13 Mad. 25.
 (h) *Kanvhai Lal v. Suraj Kunwar* (1800) 21 All. 446.
 (i) *Bombay Cotton Mfg. Co. v. Motilal Shetl* (1915) 42 I. A. 110, 30 Bom. 386.

2. The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the appellate Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this rule: O. 41,
rr. 2-4.

Grounds which may be taken in appeal

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

New questions of fact.—In this connection we may note the following observations made in the course of a judgment in a Madras case: “Though we may perhaps consider in appeal any *question of law* arising from facts which are either admitted or undisputed, we cannot allow without any satisfactory reason new *questions of fact* to be raised for the first time in appeal (j)

3. (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

Rejection or amendment of memorandum.

(2) Where the Court rejects any memorandum, it shall record the reasons for such rejection.

(3) Where a memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall sign or initial the amendment.

4. Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

One of several plaintiffs or defendants may obtain leave to appeal from the decree where it proceeds on ground common to all.

O. 41,
rr. 4, 5.

Ground common to all the defendants.—It is not necessary for the application of this rule that the decree should proceed on *every* ground common to all the plaintiffs or to all the defendants: it is quite sufficient if it proceeds on *any* ground common to all the plaintiffs or to all the defendants. *A* sues *B, C* and *D* for recovering possession of certain lands on declaration of title thereto alleging that he was dispossessed by all the defendants together in pursuance of a conspiracy between them. *B, C* and *D* file separate written statements denying *A*'s title and also denying dispossession and each claiming to hold separate parcels of land from third parties. The Court of first instance finds in favour of the title and the possession of *A* and that *A* was dispossessed by *B, C* and *D, B* alone appeals from the decree. The appellate Court finds that *A* had failed to prove the title set up by him or that he was in possession of the land. Should the appellate Court reverse the decree of the lower Court in favour of *B* alone who appealed from the decree, or should it reverse the decree of the lower Court in favour also of *C* and *D*, though they did not join in the appeal? The answer is that if the decree of the lower Court proceeded on a ground common to all the three defendants, the decree should be reversed under this rule not only in favour of *B* but also in favour of *C* and *D*. Now the ground of defence common to all the defendants was that *A* had no title to the lands and the decree of the lower Court proceeded on the ground that *A* had a title to the lands. The decree therefore proceeded on a ground common to all the defendants. The appellate Court should therefore reverse the decree not only in favour of *B* but also in favour of *C* and *D*. It is quite immaterial that the defendants claimed to be interested in different titles in *separate* portions of the lands. It is enough if *any one ground* on which the decree appealed from proceeds is common to all the defendants (*k*).

Ground common to all the plaintiffs.—*A* and his son *B* jointly sue *C* to recover Rs. 2,000. A decree is passed for the plaintiffs for Rs. 500 only. *A* alone appeals from the decree. *C* files cross-objections under r. 22 below. The appellate Court rejects the plaintiffs' claim *in toto* and reverses the decree of the lower Court. Subsequently *B*, who did not join in the appeal, applies for execution of the original decree against *C*. *B* is not entitled to take out execution, for although he was not a party to the appeal, he is bound under this rule by the decree of the appellate Court (*l*).

May reverse decree in favour of all plaintiffs or defendants.—The word "may" shows that the appellate Court is given a discretion in the matter. It may therefore reverse the decree in favour of *some* only of the plaintiffs or defendants. It is not bound to do so in favour of *all* of them (*m*).

Stay of proceedings and of execution.

V. 5. (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the appellate Court may for sufficient cause order stay of execution of such decree.

(*k*) *Ram Kanai v. Ahmed Ali* (1903) 30 Cal. 429; *Dhuttaloor v. Paidigantam* (1907) 30 Mad. 470.

(*l*) *Babaji v. Collector of Salt Revenue* (1887) 11 Bom. 590.
(*m*) *Narain v. Binaik* (1914) 33 All. 510.

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied—

- (a) that substantial loss may result to the party applying for stay of execution unless the order is made;
- (b) that the application has been made without unreasonable delay; and
- (c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) Notwithstanding anything contained in sub-rule (3) the Court may make an *ex parte* order for stay of execution pending the hearing of the application.

Stay of execution.—Once an appeal is preferred from a decree, it is the appellate Court that is seized of the matter, and any application for a stay of execution must be made to that Court. Where no appeal is preferred, the application must be made to the Court which passed the decree, but the application will not be entertained unless the decree is one from which an appeal lies and the application is made before the expiry of the time allowed by law for appealing therefrom (a).

Application of the rule.—*A* obtains a decree against *B* for recovering certain immoveable property, and applies for execution of the decree. If *B* has preferred an appeal from the decree, *B* may apply to the appellate Court for a stay of execution on the ground that if execution is not stayed and the property is delivered to *A*, *A* may do away with the property which may result in substantial loss to him. If the appellate Court is satisfied that substantial loss may result if the execution is not stayed, and if the application has been made without unreasonable delay, the appellate Court may order execution to be stayed under this rule upon security being given by *B* that if the decree of the lower Court is confirmed, he will deliver possession of the property to *A*. If the decree of the lower Court is confirmed, and if *B* fails to deliver possession of the property to *A*, *A* may proceed against the surety.

(a) *Amir Hasan v. Ahmed Ali* (1887) 9 All. 36; *Ishan Chunder v. Ashanoollah* (1884) 10

Cal. 817.

O. 41,
rr. 6, 7.

6. (1) Where an order is made for the execution of a decree from which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the appellate Court, or the appellate Court may for like cause direct the Court which passed the decree to take such security.

(2) Where an order has been made for the sale of immoveable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of.

Application of the rule.—This rule does not apply unless (1) there is an order made for the execution of a decree and (2) there is an appeal pending from that decree (o). A judgment-debtor whose application for a stay of execution is refused under r. 5 may apply under this rule. The application contemplated by sub-r. (1) is an application by the judgment-debtor (who has appealed from the decree) for security to be given by the decree-holder for the restitution of any property that may be taken in execution or for the payment of the value of such property if the decree of the lower Court is reversed in appeal. Thus if A obtains a decree against B for the recovery of certain immoveable property and an order is made for execution of the decree, B may, after filing an appeal from the decree, apply for an order requiring A to give security for the restitution of the property to him (B), or for the payment of the value thereof, if the appeal is decided in his favour. The application may be made to the Court which passed the decree or to the appellate Court. If the application is made to the Court which passed the decree, such Court shall, on sufficient cause being shown by B for requiring the security, direct A to give the security. But if the application is made to the appellate Court, that Court may in its discretion require security to be given.

7. No such security as is mentioned in rules 5 and 6 shall be required from the Secretary of State for India in Council or, where the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.

No security to be required from the Government or a public officer in certain cases.

8. The powers conferred by rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree.
- Exercise of powers in appeal from order made in execution of decree.
- O. 41,
rr. 8-10.

Procedure on admission of appeal.

- * 9. (1) Where a memorandum of appeal is admitted, the appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.
- Registry of memorandum of appeal

- (2) Such book shall be called the Register of Appeals.
- Register of Appeals.

10. (1) The appellate Court may in its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both.
- Appellate Court may require appellant to furnish security for costs.

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immoveable property within British India other than the property (if any) to which the appeal relates.

When appellant resides out of British India.

- (2) Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal.

Scope and object of the rule.—The object of the rule is to secure the respondent in an appeal from the risk of having to incur further costs which he might never succeed in getting out of the appellant. Under sub-r. (1) the appellate Court *may*, in its discretion, require security for costs. Under the proviso to that sub-rule the Court *shall* demand security for costs. If no security is furnished, the Court should reject the appeal, whether the order for security is made under the sub-rule or the proviso (p).

O. 41,
rr. 11-13.

11. (1) The appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.

Power to dismiss appeal without sending notice to lower Court.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.

12. (1) Unless the appellate Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal.

Day for hearing appeal.

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day.

13. (1) Where the appeal is not dismissed under rule 11, the appellate Court shall send notice of the appeal to the Court from whose decree the appeal is preferred.

Appellate Court to give notice to Court whose decree appealed from.

(2) Where the appeal is from the decree of a Court, the records of which are not deposited in the appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers, as may be specially called for by the appellate Court.

Transmission of papers to appellate Court.

(3) Either party may apply in writing to the Court from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made; and copies of such papers shall be made at the expense of, and given to, the applicant.

Copies of exhibits in Court whose decree appealed from.

14. (1) Notice of the day fixed under rule 12 shall be ^{Publication and service of notice of day for hearing appeal} affixed in the appellate Court-house, and a like notice shall be sent by the appellate Court to the Court from whose decree the appeal is preferred, and shall be served on the respondent or on his pleader in the appellate Court in the manner provided for the service on a defendant of a summons to appear and answer; and all the provisions applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice. O. 41, rr. 14-17.

(2) Instead of sending the notice to the Court from whose decree the appeal is preferred, the appellate Court may itself cause the notice to be served on the respondent or his pleader under the provisions above referred to.

15. The notice to the respondent shall declare that, ^{Content of notice} if he does not appear in the appellate Court on the day so fixed, the appeal will be heard *ex parte*.

Procedure on hearing.

16. (1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal. ^{Right to be heard}

(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply.

17. (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed. ^{Dismissal of appeal for appellant's default}

(2) Where the appellant appears and the respondent does not appear, the appeal shall be ^{Hearing appeal ex parte} heard *ex parte*.

O. 41,
rr. 18-20.

18. Where on the day fixed, or on any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice, the Court may make an order that the appeal be dismissed :

Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs.

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing.

Effect of dismissal of appeal against one of several respondents for non-service of notice.—*A, B and C obtain a decree for joint possession against D. D appeals from the decree. A and B are served with the notice of appeal, but C is not. The appeal is thereupon dismissed as against C. Is D entitled to proceed with the appeal as against A and B? No, for even if the appellate Court reversed the decree of the lower Court, that decree being one for joint possession, C alone could execute the entire decree so as to nullify the decree of the appellate Court (g).*

19. Where an appeal is dismissed under rule 11, sub-rule (2) or rule 17 or rule 18, the appellant may apply to the appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

Re-admission of appeal dismissed for default.

20. Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent.

Power to adjourn hearing and direct persons appearing interested to be made respondents.

Adding of parties under this rule discretionary.—It is a question for the Court in its discretion to determine in each case whether or not it will make an order for the addition of a party as contemplated by this rule (r).

(g) *Easer v. Faele* (1911) 19 C. W. N. 290.
(r) *Anlook Chand v. Surat Chander* (1911) 38

Cal. 913, 919.

21. Where an appeal is heard *ex parte* and judgment is pronounced against the respondent, he may apply to the appellate Court to rehear the appeal; and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing the Court shall rehear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.

Re-hearing on application of respondent against whom *ex parte* decree made.

O. 41,
rr. 21, 22.

22. (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the appellate Court may see fit to allow.

Upon hearing respondent may object to decree as if he had picked separate appeal.

(2) Such cross-objection shall be in the form of a memorandum, and the provision of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

Form of objection and provisions applicable thereto

(3) Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy thereof the appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule.

O. 41,
rr. 22, 23.

Cross-objections.—Suppose that in a suit brought by *A* against *B*, *B* sets up two defences and the Court of first instance determines in his favour as to one of them, and against his as to the other, and dismisses *A*'s suit. If *A* appeals, *B* may support the decree at the hearing of the appeal not only on the ground decided in his favour, *but also on the ground decided against him, without filing any cross-objection (s)*. Suppose now that *A*'s claim is decreed in part. In such a case *A* may appeal from the decree, alleging that a decree ought to have been passed for the full amount claimed by him. And *B* also may appeal from the decree, alleging that the suit ought to have been dismissed altogether. If *A* appeals from the decree, and *B* also appeals, *B*'s appeal is called a cross-appeal. But *B* may not file a cross-appeal and he may file cross objections under this rule. In the cross-objections filed by *B* under this rule, *B* may take any objection to the decree which he could have taken by way of appeal (*t*). If no cross-objections are filed at all by a respondent, the appellate Court has no power to grant any relief to him in a case where the granting of such relief is not necessarily incidental to the relief granted to the appellant (*u*), nor has it the power, in the absence of cross-objections, to disturb so much of the original decree as is favourable to the appellant so as to place the appellant in a worse position (*v*).

Against whom cross-objections may be urged.—It has been held by the High Courts of Calcutta, Bombay and Allahabad, that as a general rule the right of a respondent to urge cross-objections should be limited to his urging them only against the appellant; and that it is *only by way of exception* to this general rule that one respondent may urge cross-objections against other respondents, the exception holding good in those cases in which the appeal opens up questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents (*w*). According to the Madras High Court, a respondent may urge cross-objections against a co-respondent *in any and every case (x)*.

Sub-rule (4): where the appeal is withdrawn or dismissed for default.

Under the present rule the withdrawal of an appeal is no bar to the hearing of cross-objections filed by a respondent, whether the appeal is withdrawn before or after the hearing. Similarly the dismissal of an appeal for default is no bar to the hearing of cross-objections.

23. Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit:

Remand of case by
appellate Court.

(s) *Lala Gauri Shanker v. Janji Parshad* (1890) 17 Cal. 809, 813-814, 17 I. A. 57.

(t) *Balak v. Kausil* (1882) 4 All. 491.

(u) *Kulakada v. Viswanatha* (1905) 28 Mad. 229; *Casperaz v. Kishori Lal* (1896) 23 Cal. 922, 929.

(v) *Cheda Lal v. Budulath* (1880) 11 All. 35;

Aghil v. Dino Nath (1907) 34 Cal. 996.

(w) *Mathura v. Ram Kumar* (1916) 43 Cal. 791.

828; *Nurrey v. Harrison* (1913) 37

Bom. 511; *Abdul Ghani v. Muhammad*

(1905) 28 All. 65.

(x) *Munisami v. Abbu* (1912) 38 Mad. 705

[I. B.]

and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand. O. 41,
rr. 23-25.

Remand of case by appellate Court.—This rule enables the appellate Court to remand a case to the lower Court for determination on the merits, if the lower Court has disposed of the suit upon a *preliminary point*, and the decree of that Court is *reversed* in appeal. The expression “preliminary point” is not confined to such legal points only as may be pleaded in bar of a suit but comprehends all points or issues *whether of fact or of law*, the determination of which has precluded the necessity for determining other points or issues, and such other points or issues have therefore been left undetermined (y). Thus where the lower Court dismisses the plaintiff's suit on the ground that it is barred by *limitation*, or that the Court has no *jurisdiction* to hear the suit, or that the *necessary leave* has not been obtained, or that the plaint does not on the face of it disclose any *cause of action* (z), and the appellate Court reverses the decree of the lower Court on those points, it may remand the case to the lower Court to be proceeded with on the merits. It does not matter, according to the Allahabad High Court, that evidence has been recorded on *all* the issues (a).

The power of remand under s. 107 of the Code is limited to the case described in the present rule, namely, where a suit has been disposed of by the Court of first instance upon a *preliminary point*. Under special circumstances, however, the appellate Court has inherent power under s. 151 to remand a case in cases other than those specified in the present rule (b).

24. Where the evidence upon the record is sufficient to enable the appellate Court to pronounce judgment, the appellate Court may, after re-settling the issues, if necessary, finally determine the suit notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the appellate Court proceeds.

Where evidence on record sufficient, appellate Court may determine case finally.

Scope of the rule.—The scope of this rule is limited to cases in which the evidence upon the record is *sufficient* to enable the appellate Court to determine the suit (c).

25. Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the appellate Court essential to the right decision of the suit upon the merits, the appellate

Where appellate Court may frame issues and refer them for trial to Court whose decree appealed from.

- (y) *Muhammad v. Muhammad* (1888) 13 All. 289;
Romachandra v. Hazi Kassim (1893) 16
Mad. 207.
(z) *Kanakammal v. Rangachariar* (1897) 20
Mad. 25.
(a) *Mata Dui v. Jitima Das* (1905) 27 All. 691 ;

- Kanta v. Parbhu* (1917) 39 All. 165.
(b) *Ghuznavi v. Allahabad Bank* (1917) 44 Cal.
929 [F. B.] ; *Mani Mohan v. Ramtaran*
(1916) 43 Cal. 148.
(c) *Bandi v. Madulapalli* (1880) 3 Mad. 96.

O. 41, Court may, if necessary, frame issues, and refer the same
rr. 25-27. for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required :

and such Court shall proceed to try such issues, and shall return the evidence to the appellate Court together with its findings thereon and the reasons therefor.

* The words "and the reasons therefor" in paragraph 2 are new.

116 **Scope of the rule.**—This rule refers to cases in which the evidence upon the record is *not sufficient* to enable the appellate Court to determine the suit.

✓ 26. (1) Such evidence and findings shall form part of the record in the suit; and either party may, within a time to be fixed by the appellate Court, present a memorandum of objections to any finding.

Findings and evidence to be put on record. Objections to finding.

(2) After the expiration of the period so fixed for presenting such memorandum the appellate Court shall proceed to determine the appeal.

Determination of appeal.

27. (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate Court. But if —

Production of additional evidence in appellate Court.

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced, by an appellate Court, the Court shall record the reason for its admission.

At what stage additional evidence may be admitted.—Under this rule the admissibility of additional evidence is made to depend, not upon the relevancy or materiality to the issue before the Court of the evidence sought to be admitted, or upon the fact whether or not the applicants had an opportunity of adducing evidence at some earlier stage, but upon whether or not the appellate Court requires the evidence to enable it to pronounce judgment or for any other substantial cause. But additional evidence under this rule should not be taken until the appellate Court has examined the evidence on the record, and has after such examination come to the conclusion that the evidence as it stands is inherently defective. Until this is done, the appellate Court has no power to admit additional evidence, not even if the evidence offered be the evidence of new matter discovered after the Court of first instance had pronounced its judgment. As observed by their Lordships of the Privy Council in *Kessowji Issur v. G. I. P. Ry. (d)*, “the legitimate occasion for [the application of the present rule] is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence, and the application is made to import it.” It must, however, be noted that where additional evidence is taken by the High Court with the assent of both sides, it is not open to either party to complain of it (e).

The power given under this rule should be exercised very sparingly by the Courts, and great caution should be exercised in admitting new evidence (f). Additional evidence must not be allowed to enable a plaintiff to make out a fresh case in appeal. If cases were remanded for the purpose of allowing parties to make out a new case or to improve their case by calling further evidence, there would be no end to litigation (g).

Where the appellate Court requires a witness to be examined.—An appellate Court should not under this rule recall and re-examine before it a witness who has already been examined and cross-examined before the Court of first instance, there being no gap in the evidence or new matter about which it is necessary to examine him (h). Further, an appellate Court should not under cl. (b) of this rule allow to be produced before it additional evidence which impeaches the testimony of a witness called in the Court below, without that witness also being called and being given an opportunity to contradict or explain the additional evidence so given; otherwise no witness, whatever his standing, would be safe from adverse judicial comment (i).

28. Wherever additional evidence is allowed to be produced, the appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the appellate Court.

Mode of taking additional evidence.

Documentary evidence.—It need hardly be stated that where the additional evidence taken by the Court consists of documents, they should be exhibited in the case (j).

(d) (1907) 31 Bom. 381, 34 I. A. 115; *Krishnamma v. Narasimha* (1908) 31 Mad. 114; *Garden Reach Spg. & Wg. Co. v. Secretary of State* (1914) 42 Cal. 675.

(e) *Jagannath v. Hanuman* (1909) 36 Cal. 833, 36 I. A. 221.

(f) *Sreenanichunder v. Gopalchunder* (1868) 11 M. I. A. 28 7 W. R. 10.

(g) *Hurpurshad v. Shea Dyal* (1876) 26 W. R. 53, 3 I. A. 239.

(h) *Muhammad v. Mahmud-un-Nissa* (1916) 38 All. 191.

(i) *Jagrani v. Kaur Durga* (1913) 41 I. A. 76, 36 All. 93.

(j) *Daji v. Sakharam* (1914) 38 Bom. 665.

D. 41,
29-31.

29. Where additional evidence is directed or allowed to be taken the appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified.

Points to be defined and recorded.

Judgment in Appeal.

30. The appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day, of which notice shall be given to the parties or their pleaders.

Judgment when and where pronounced.

31. The judgment of the appellate Court shall be in writing and shall state—

Content, date and signature of judgment.

- (a) the points for determination ;
- (b) the decision thereon ;
- (c) the reasons for the decision ; and
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled :

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

Shall state the reasons for the decision.—The judgment of the appellate Court should state the *reasons* for the decision. The reason of the rule has been stated to be to afford the litigant parties an opportunity of knowing and understanding the grounds upon which the decision proceeds with a view to enable them to exercise, if they see fit, and are so advised, the right of second appeal conferred by s. 100. If the decree of the first Court is confirmed in appeal, the Judge of the appellate Court should state *his own reasons* of the case, and should not confine himself to approving of the reasons of the Court of first instance (k). The reason is that the judgment should show on the face of it that the points in dispute were clearly before the mind of the Judge and that he exercised *his own discrimination* in deciding them. Thus where the judgment was—“To deal with the grounds of appeal would be simply to repeat the judgment of the District Munsif. I concur with the decision the District Munsif has given on each point. The judgment of the lower Court is confirmed *for the reason therein set forth*, and this appeal is dismissed with costs.” the judgment was set aside (l).

(k) *Kirani v. Subahet* (1884) 8 Bom. 28.

(l) *Silarama v. Suraja* (1899) 22 Mad. 12; *See*

harwa v. Babu Nand (1887) 9 All. 26.

32. The judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, or, if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be made in appeal, the appellate Court may pass a decree or make an order accordingly.

O. 41,
rr. 32-34.

33. The appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

What judgment may direct.
Power of Court of Appeal.

Illustrations.

A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals, and A and Y are respondents. The appellate Court decides in favour of X. It has power to pass a decree against Y.

Cases to which rule applies.—This rule is new. The object of the rule is to empower the appellate Court to do complete justice between the parties. The illustration indicates a type of case for which provision is intended to be made. The following is a further illustration.

(1) A sues B and C for contribution. A decree is passed against B, but as against C the suit is dismissed. B appeals making A alone respondent to the appeal. A does not appeal from the decree dismissing the suit as against C. If the appellate Court is of opinion that C is liable, and not B, it may under r. 20 direct that C be added as a respondent as being a person "interested in the result of the appeal," and may under the present rule alter the decree so as to make C liable though there was no appeal preferred by A from the dismissal of the suit against C. This is in accordance with the Calcutta rulings under the Code of 1882 (m).

34. Where the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the Court shall state in writing the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same.

Dissent to be recorded.

(m) *Upendra Lal v. Grindra Nath* (1898) 25 Cal. 365; *Rup Jaun Bibee v. Abdul Kadir*

(1904) 31 Cal. 643.

Decree in Appeal.

O. 41,
r. 35-37.

35. (1) The decree of the appellate Court shall bear date the day on which the judgment was pronounced.

infirm
infirm
Date and contents of decree.

(2) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent and a clear specification of the relief granted or other adjudication made.

(3) The decree shall also state the amount of costs incurred in the appeal, and by whom, or out of what property, and in what proportions such costs and the costs in the suit are to be paid.

(4) The decree shall be signed and dated by the Judge or Judges who passed it :

Provided that where there are more Judges than one and there is a difference of opinion among them, it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree.

Judge dissenting from judgment need not sign decree.

36. Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the appellate Court and at their expense.

Copies of judgment and decree to be furnished to parties.

37. A copy of the judgment and of the decree, certified by the appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed from and shall be filed with the original proceedings in the suit, and an entry of the judgment of the appellate Court shall be made in the register of civil suits.

Certified copy of decree to be sent to Court whose decree appealed from.

ORDER XLII.*Appeals from Appellate Decree.*

1. The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees.

Procedure.

See s. 108, cl. (a).

ORDER XLIII.

Appeals from Orders.

1. An appeal shall lie from the following orders under O. 43, r. 1.
Appeals from orders. the provisions of section 104, namely :—

- (a) an order under rule 10 of Order VII returning a plaint to be presented to the proper Court ;
- (b) an order under rule 10 of Order VIII pronouncing judgment against a party ;
- (c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit ;
- (d) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte* ;
- (e) an order under rule 4 of Order X pronouncing judgment against a party ;
- (f) an order under rule 21 of Order XI ;
- (g) an order under rule 10 of Order XVI for the attachment of property ;
- (h) an order under rule 20 of Order XVI pronouncing judgment against a party ;
- (i) an order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement ;
- (j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale ;
- (k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit ;
- (l) an order under rule 10 of Order XXII giving or refusing to give leave ;

O. 43,
rr. 1, 2.

- (m) an order under rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction ;
- (n) an order under rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit ;
- (o) an order under rule 3 or rule 8 of Order XXXIV refusing to extend the time for the payment of mortgage-money ;
- (p) orders in interpleader-suits under rule 3, rule 4 or rule 6 of Order XXXV ;
- (q) an order under rule 2, rule 3 or rule 6 of Order XXXVIII.
- (r) an order under rule 1, rule 2, rule 4 or rule 10 of Order XXXIX ;
- (s) an order under rule 1 or rule 4 of Order XL ;
- (t) an order of refusal under rule 19 of Order XLI to re-admit or under rule 21 of Order XLI to re-hear an appeal ;
- (u) an order under rule 23 of Order XLI remanding a case, where an appeal would lie from the decree of the appellate Court ;
- (v) an order made by any Court other than a High Court refusing the grant of a certificate under rule 6 of Order XLV ;
- (w) an order under rule 4 of Order XLVII granting an application for review.

Section 104.—This rule provides for appeals from *orders* as distinguished from *decrees*. The whole of this rule forms part of s. 104, see sub-s. (1), cl. (i) of that section. Note that no second appeal lies from an order passed in appeal under this rule ; see s. 104 (2).

2. The rules of Order XLI shall
 Procedure. apply, so far as may be, to appeals from
 orders.

See s. 108, cl. (b).

ORDER XLIV.

Pauper Appeals.

1. Any person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as a pauper, subject, in all matters including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable ;

O. 44,
rr. 1, 2

Provided that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust.

Procedure on application for admission as pauper

Subject to the provisions relating to suits by paupers.—*A* sues *B* to recover certain properties as heiress or her deceased husband. The suit is dismissed. *A* applies for leave to appeal as a pauper. It is found on inquiry that *A* had before entering the suit entered into an agreement falling within the terms of O. 33, r. 5 (d), which would have disentitled *A* to sue as a pauper. The appellate Court should under these circumstances refuse leave to *A* to appeal as a pauper (*a*).

2. The inquiry into the pauperism of the applicant may be made either by the appellate Court or under the orders of the appellate Court by the Court from whose decision the appeal is preferred :

Inquiry into pauperism

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court from whose decree the appeal is preferred, no further inquiry in respect of his pauperism shall be necessary, unless the appellate Court sees cause to direct such inquiry.

ORDER XLV.

Appeals to the King in Council.

1. In this order, unless there is something repugnant in the subject or context, the expression “decree” shall include a final order.

When appeals lie to King in Council.—See ss. 109 and 110.

o. 45,
rr. 2-5.

2. Whoever desires to appeal to His Majesty in Council shall apply by petition to the Court whose decree is complained of.

Application to Court
whose decree complained
of.

3. (1) Every petition shall state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of section 110, or that it is otherwise a fit one for appeal to His Majesty in Council.

Certificate as to value
or fitness.

(2) Upon receipt of such petition, the Court shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted.

Certificate as to fitness.—Where a case fulfils the requirements of s. 110, the petitioner is entitled to a certificate *as of right* in the ordinary course of procedure. But where a case does not fulfil the requirements of s. 110 as where the matter is under the appealable value or is not measurable by money, the granting of the certificate is entirely *in the discretion* of the Court (o). In the former case, the High Court should certify the sufficiency of the amount for appeal to the Privy Council, and should also certify, when the decision of the lower Court is affirmed, that the appeal involves a question of law. In the latter case, it is quite enough if the certificate states that the case is a fit one for appeal to His Majesty in Council (p). See ss. 109-110.

4. For the purposes of pecuniary valuation suits involving substantially the same questions for determination and decided by the same judgments may be consolidated : but suits decided by separate judgments shall not be consolidated, notwithstanding that they involve substantially the same questions for determination.

Consolidation of suits

Consolidation of suits.—This rule is new. In the absence of any such rule in the Code of 1882, it was held by the High Court of Allahabad that suits involving substantially the same questions for determination could be consolidated for the purpose of reaching the pecuniary limit necessary for an appeal, if the property affected by the suits was the same, notwithstanding that the suits were decided by *separate judgments*. According to the Calcutta decisions, however, such consolidation was not permissible unless the suits, besides involving the same question for determination, were decided by the *same judgment*. The present rule gives effect to the Calcutta rulings.

5. In the event of any dispute arising between the parties as to the amount or value of the subject-matter of the suit in the Court of first instance, or as to the amount or value

Remission of dispute
to Court of first instance.

(o) *Banarsi Prasad v. Kashi Krishna* (1901) 23 All. 227, 231, 28 I. A. 11.

(p) *Webb v. Macpherson* (1904) 31 Cal. 37, 30 I. A. 213.

of the subject-matter in dispute on appeal to His Majesty in Council, the Court to which a petition for a certificate is made under rule 2 may, if it thinks fit, refer such dispute for report to the Court of first instance, which last mentioned Court shall proceed to determine such amount or value and shall return its report together with the evidence to the Court by which the reference was made.

O. 45,
rr. 5-7

Effect of refusal of certificate

6. Where such certificate is refused, the petition shall be dismissed.

7. (1) Where the certificate is granted, the applicant shall, within six months from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date.

Security and deposit required on grant of certificate

(a) furnish security for the costs of the respondent, and

(b) deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit, except—

(1) formal documents directed to be excluded by any order of His Majesty in Council in force for the time being ;

(2) papers which the parties agree to exclude ;

(3) accounts, or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included ; and

(4) such other documents as the High Court may direct to be excluded.

(2) Where the applicant prefers to print in India, the copy of the record, except as aforesaid, he shall also, within the time mentioned in sub-rule (1), deposit the amount required to defray the expense of printing such copy.

O. 45.
r. 8-11.

8. Where such security has been furnished and deposit made to the satisfaction of the Court, the Court shall—
Admission of appeal and
procedure thereon

- (a) declare the appeal admitted,
- (b) give notice thereof to the respondent,
- (c) transmit to His Majesty in Council under the seal of the Court a correct copy of the said record, except as aforesaid, and
- (d) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable expenses incurred in preparing them.

9. At any time before the admission of the appeal, the Court may, upon cause shown, revoke the acceptance of any such security, and make further directions thereon.
Revocation of acceptance of security.

10. Where at any time after the admission of an appeal but before the transmission of the copy of the record, except as aforesaid, to His Majesty in Council, such security appears inadequate,
Power to order further security or payment

or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, except as aforesaid,

the Court may order the appellant to furnish, within a time to be fixed by the Court, other and sufficient security, or to make, within like time, the required payment.

11. Where the appellant fails to comply with such order, the proceedings shall be stayed,
Effect of failure to comply with order.

and the appeal shall not proceed without an order in this behalf of His Majesty in Council,

and in the meantime execution of the decree appealed from shall not be stayed.

12. When the copy of the record, except as aforesaid, has been transmitted to His Majesty in Council, the appellant may obtain a refund of the balance (if any) of the amount which he has deposited under rule 7.

Refund of balance deposited.

O. 45,
rr. 12, 1

13. (1) Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless the Court otherwise directs.

Power of Court pending appeal.

(2) The Court may, if it thinks fit, on special cause shewn by any party interested in the suit, or otherwise appearing to the Court.—

(a) impound any moveable property in dispute or any part thereof, or

(b) allow the decree appealed from to be executed, taking such security from the respondent as the Court thinks fit for the due performance of any order which His Majesty in Council may make on the appeal. or

(c) stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from, or of any order which His Majesty in Council may make on the appeal, or

(d) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal, as it thinks fit, by the appointment of a receiver or otherwise.

Stay of execution in view of an application for special leave to appeal.

—The High Court has an inherent power to make an order for stay of execution in view of an application by the judgment-debtor to the Judicial Committee for special leave to appeal to His Majesty in Council (q). See notes to s. 109, “*Pierogative*” of the Crown.

Security after execution.—The Court has power to require security to be given under this rule even after the decree has been executed wholly or in part (r).

(q) *Nanda Kishore v. Ram Golum* (1912) 40 Cal. 535.

(r) *Indar Kumari v. Jaipal Kumari* (1937) 14 Cal. 290, 295, 14 I. A. 1.

O. 45. It has also the power to *stay* further execution after the decree has been partially
r. 13-15. executed (s).

14. (1) Where at any time during the pendency of the appeal, the security furnished by either
Increase of security
found inadequate. party appears inadequate, the Court may, on the application of the other party, require further security.

(2) In default of such further security being furnished as required by the Court,—

(a) if the original security was furnished by the appellant, the Court may, on the application of the respondent, execute the decree appealed from as if the appellant had furnished no such security ;

(b) if the original security was furnished by the respondent, the Court shall, so far as may be practicable, stay the further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject-matter of the appeal as it thinks fit.

15. (1) Whoever desires to obtain execution of any order of His Majesty in Council shall
Procedure to enforce orders of King in Council. apply by petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to be executed, to the Court from which the appeal to His Majesty was preferred.

(2) Such Court shall transmit the order of His Majesty in Council to the Court which passed the first decree appealed from, or to such other Court as His Majesty in Council by such order may direct, and shall (upon the application of either party) give such directions as may be required for the execution of the same ; and the Court to which the said order is so transmitted shall execute it accordingly, in the manner and according to the provisions applicable to the execution of its original decrees.

(3) When any monies expressed to be payable in British currency are payable in India under such order, the amount so payable shall be estimated according to the rate of exchange for the time being fixed at the date of the making of the order by the Secretary of State for India in Council with the concurrence of the Lords Commissioners of His Majesty's Treasury for the adjustment of financial transactions between the Imperial and the Indian Governments. O. 45,
rr. 15, 16

Functions of the High Court under this rule.—The act of the High Court in receiving and filing orders of His Majesty in Council under this rule is a purely ministerial (as distinguished from a judicial) function. The High Court, therefore, has no power under this rule to discuss the effect of the order of His Majesty in Council on an application to file the order. If the order is impeached as erroneous, the proper course for the party aggrieved by the order is to apply to His Majesty in Council to make the necessary alteration or modification in the order (*l*).

16. The orders made by the Court which executes the order of His Majesty in Council, relating to such execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the execution of its own decrees.

Appeal from order relating to execution.

ORDER XLVI.

Reference.

1. Where, before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court. O. 46, r.

Reference of question to High Court.

Hearing of a suit or appeal.—A reference can be made to the High Court under this rule only in a *suit* or *appeal in a suit*, and not in every matter before the Court in which a point arises on which the Court entertains reasonable doubt (*u*). Thus where

(*t*) *Premal v. Sumbhoonath* (1895) 22 Cal. 960.] (*u*) *Mahamad v. Ahmadbhai* (1901) 25 Bom. 327.

O. 46, a pleader was fined Rs. 25 by a Subordinate Judge for refusing to act on behalf of his
rr. 1-5. client after receipt of retaining fee, and on appeal the District Judge referred the matter to the High Court under this rule, it was held that no reference could properly be made under this rule as there was no *suit or appeal in a suit (v)*. Nor can any reference be made under this rule read with s. 141 (*w*).

Decree not subject to appeal.—This rule does not authorize a reference to the High Court except in a suit or appeal in which the decree is not subject to appeal. Therefore no reference can be made to the High Court in a matter in which an appeal lies to the High Court, as in such a case the point may be decided by the High Court in appeal (*x*). It is only when a matter cannot come before the High Court as a Court of Appeal that a reference can be made under this rule (*y*).

2. The Court may either stay the proceedings or proceed in the case notwithstanding such reference, and may pass a decree or make an order contingent upon the decision of the High Court on the point referred ;

Court may pass decree contingent upon decision of High Court.

but no decree or order shall be executed in any case in which such reference is made until the receipt of a copy of a judgment of the High Court upon the reference.

3. The High Court, after hearing the parties if they appear and desire to be heard, shall decide the point so referred, and shall transmit a copy of its judgment, under the signature of the Registrar to the Court by which the reference was made and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court.

Judgment of High Court to be transmitted, and case disposed of accordingly.

4. The costs (if any) consequent on a reference for the decision of the High Court shall be costs in the case.

Costs of reference to High Court.

5. Where a case is referred to the High Court under rule 1, the High Court may return the case for amendment, and may alter, cancel or set aside any decree or order which the Court making the reference has passed or made in the case out of which the reference arose, and make such order as it thinks fit.

Power to alter, &c., decree of Court making reference.

(1) *Yashwant v. De Souza* (1888) 12 Bom. 78.
 (2) *Damodara v. Kittappa* (1911) 36 Mad. 16
 (3) *Rangji v. Bhaiji* (1887) 11 Bom. 57.

(4) *Secretary of State v. Fazal* (1891) 15 Cal. 234; *Oriental Loan Ass., Ltd., v. Hotel* (1893) 17 Bom. 735.

6. Where at any time before judgment a Court in which a suit has been instituted doubts whether the suit is cognizable by a Court of Small Causes or is not so cognizable, it may submit the record to the High Court with a statement of its reasons for the doubt as to the nature of the suit. O. 46,
rr. 6, 7.

Power to refer to High Court questions as to jurisdiction in small causes.

(2) On receiving the record and statement, the High Court may order the Court either to proceed with the suit or to return the plaint for presentation to such other Court as it may in its order declare to be competent to take cognizance of the suit.

At any time before judgment.—A reference under this rule can only be made before judgment (c).

7. (1) Where it appears to a District Court that a Court subordinate thereto has, by reason of erroneously holding a suit to be cognizable by a Court of Small Causes or not to be so cognizable, failed to exercise a jurisdiction vested in it by law, or exercised a jurisdiction not so vested, the District Court may, and if required by a party shall submit the record to the High Court with a statement of its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous.

Power to District Court to submit for revision proceedings had under mistake as to jurisdiction in small causes.

(2) On receiving the record and statement the High Court may make such order in the case as it thinks fit.

(3) With respect to any proceedings subsequent to decree in any case submitted to the High Court under this rule, the High Court may make such order as in the circumstance appears to it to be just and proper.

(4) A Court subordinate to a District Court shall comply with any requisition which the District Court may make for any record or information for the purposes of this rule.

Provincial Small Cause Courts' Act 9 of 1887, s. 16.—Section 16 of the Provincial Small Cause Courts' Act runs as follows: "Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes *shall not be tried* by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable."

ORDER XLVII.

Review.

O. 47, r. 1.

Application for review
of judgment

1. (1) Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
- (b) by a decree or order from which no appeal is allowed, or
- (c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when being respondent, he can present to the Appellate Court the case on which he applies for the review.

In what cases a party may apply for a review.—A party aggrieved by a decree or a decision specified in clauses (a), (b) or (c) of sub-rule (1), may apply for a review in any of the following cases :—

- I. on the ground of the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the party or could not be produced by him at the time when the decree was passed or order made : or
- II. on account of some mistake or error apparent on the face of the record or
- III. for any other sufficient reason.

Order on application.—Where a party aggrieved by a decree applies for a review, the application may either be granted or rejected (r. 4 below).

If the application is rejected then the case ends, and the parties are relegated to **O. 47, r. 1.** the old decree. The order rejecting the application is final, and no appeal lies therefrom (r. 7), but the party aggrieved may appeal from the old decree.

If the application is admitted, then the case is re-heard and may result in a re-petition of the decree or in some variation of it. In *either* case, the whole matter having been re-opened, there is a *fresh* decree (a).

I. Discovery of new and important matter or evidence.—When a review is sought on the ground of the discovery of new evidence, the evidence must be (1) relevant and (2) of such a character that if it had been given in the suit it might possibly have altered the judgment (b).

It is not to be supposed that the discovery of new evidence is by itself sufficient to entitle a party to a review of judgment. The provision relating to review contemplates grounds which would *alter or cancel the decree*. Thus, if a suit is dismissed on two grounds, namely, (1) that no notice of suit was given as required by law, and (2) that the plaintiff was illegitimate, as the plaintiff applies for a review on the ground of discovery of new evidence on the question of legitimacy, it is a good ground for rejecting the application that even if the Court held on the reception of new evidence that the plaintiff was legitimate, the decree would still stand good on the other issue in the case, namely, the want of proper notice, and it would therefore lead to the modification or setting aside of the original decree (c).

II. Mistake or error apparent on the face of the record.—A review may be granted, whether on any ground urged at the original hearing of the suit or not, whenever the Court considers that it is necessary to correct an *evident* error or omission (d). Thus a review was granted where an error on a point of law was apparent on the face of the judgment (e). Similarly a review was granted when the provisions of the second paragraph of s. 375 [now s. 98, sub-s. (2)] were wrongly applied (f). See s. 152.

III. "For any other sufficient reason."—These words mean that the reason must be one sufficient to the Court to which the application for review is made, and they cannot be held to be limited to the discovery of new and important matter or evidence, or the occurring of a mistake or error apparent on the record (g). Thus in *Ghansham v. Lal Singh* (h), a reference to the Full Bench was disposed of in the absence of the respondent. The respondent proved that his absence at the hearing was due to the fact that the notice of reference was not served upon him. It was held that this constituted a "sufficient reason" for granting a review. In *Sullemann v. The New Oriental Bank Corporation Ltd.* (i), a review was granted on the ground that the question that had cropped up at the hearing was one of great general commercial importance. In *Gopal v. Solomon* (j), all the parties, counsel on both sides, and the Judge, were at the trial of the suit under a misapprehension as to the contents of a document. It was held that this was a "sufficient reason" for granting a review. But a party who not only had an opportunity of raising a question but who did raise it, and on argument

(a) *Vadilal v. Fulechand* (1906) 30 Bom. 56.

(1887) 24 Cal. 334, 336.

(b) *Appa Rao, in re* (1887) 10 Mad. 73, 77, 13 I. A. 155.

(f) *Husaini Begum v. Collector of Musaffarnagar* (1889) 11 All. 176.

(c) *Mahabir v. Collector of Allahabad* (1911) 36 All. 377.

(g) *Reant v. Hadjee Abdoolah* (1877) 2 Cal. 131, 3 I. A. 221.

(d) *Kalu v. Vishram* (1877) 1 Bom. 543.

(h) (1887) 9 All. 61.

(e) *Sharup Chand v. Pat Dassee* (1887) 14 Cal. 627; *Jatra Mohan v. Avkhit Chandara*

(i) (1891) 15 Bom. 267, (j) (1886) 13 Cal. 62.

- O. 47, abandoned it, cannot under ordinary circumstances be allowed to agitate that question
 r.r. 1, 2. in review (*k*). Nor is it a sufficient reason for granting a review that if another opportunity was given to the applicant, he would satisfy the Court that its previous order was wrong (*l*).

Where an appeal has been preferred before application for review.—After an appeal *has been preferred* from a decree, no application can be made for review of that decree. This clearly appears from cl. (a) of sub-r. (1).

Filing of appeal pending application for review.—Where an application for review has been presented by a party to the suit, and an appeal is afterwards preferred from the same decree, whether by the same party or by the other party to the suit, the Court to which the application for review is made is not thereby deprived of jurisdiction to entertain the application (*m*). But the power exists so long as the appeal is not heard (*n*). And, further, if the application for review is heard and granted, and a new decree is passed, the appeal cannot be heard, and it must be dismissed, for the decree appealed from is superseded by the new decree (*o*).

2. An application for review of a decree or order of a Court, not being a High Court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree shall be made only to the Judge who passed the decree or made the order sought to be reviewed; but any such application may, if the Judge who passed the decree or made the order has ordered notice to issue under rule 4, sub-rule (2), proviso (a), be disposed of by his successor.

To whom applications for review may be made.

To whom applications for review may be made :—

I. Where a decree is passed by a *High Court Judge*, the application for a review of the decree may be made to that Judge or to his successor in office, *whatever be the ground on which the review is sought*.

II. (1) Where a decree is passed by a *Judge other than a High Court Judge*, the application for a review of the decree may be made to the Judge who delivered the judgment or to his successor in office, *provided the review is sought on the ground of—*

(a) the discovery of new and important matter or evidence, or

(b) some clerical or arithmetical mistake or error apparent on the face of the decree.

(2) Where a decree is passed by a *Judge other than a High Court Judge*, and the review is sought, not upon the grounds mentioned above, but *upon other ground*, the

(*k*) *Sabapathi v. Subraya* (1878) 2 Mad. 58.

(*l*) *Bindu Prasad v. Raghunath* (1915) 37 All. 440.

(*m*) *Chenna Reddi v. Peddaobi Reddi* (1909) 32 Mad. 416 [F. B.].

(*n*) *Pynri Mohan v. Kalu Khan* (1917) 44 Cal. 1011.

(*o*) *Kanhaiya Lal v. Naidoo Prasad* (1900) 28 All. 240; *Brijbasi Lal v. Saliq Ram* (1912) 34 All. 282.

application *shall* be made to the very Judge who passed the decree ; it cannot be made to his successor in office (p). Thus if a review is sought of a decree passed by a Judge other than a High Court Judge on the ground of a supposed error of judgment (q), or if a review is sought of an order made by such a judge on the ground that the order was made in the absence of the petitioner and without giving him notice of the hearing (r), the application for review *shall be made* only to the Judge who passed the decree or made the order. Such application, however, *may be disposed of* by the successor of the Judge who passed the decree, provided that the Judge who passed the decree has ordered notice to issue under rule 4, sub-rule (2), proviso (a). It is not necessary that the application should also be *disposed of* by the Judge who passed the decree (s).

O. 47,
rr. 2-4

Rule 5 provides for the hearing of applications for review.

3. The provisions as to the form of preferring appeals shall apply. *mutatis mutandis*, to applications for review.

Form of application
for review.

4. (1) Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

Application when re-
jected.

(2) Where the Court is of opinion that the application for review should be granted, it shall grant the same :

Application when grant-
ed.

Provided that—

(a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for : and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation.

“ No such application shall be granted without previous notice to the opposite party.”—An order granting a review without notice to the opposite party is a nullity (t).

(p) *Sarangayadi v. Narayanasami* (1885) 8 Mad. 567 ; *Moheshur Singh v. Bengal Government* (1859) 7 M. L. A. 304.
(q) *Behari Lal v. Musagolath* (1880) 5 Cal. 110.

(r) *Khema v. Dhurji* (1890) 14 Bom. 101.
(s) *Gaupal v. Jagan* (1892) 10 Bom. 501.
(t) *Abdul Hakim v. Hem Chandra* (1911) 42 Cal. 433.

O. 47,
rr. 5-7.

5. Where the Judge or Judges, or any one of the Judges, who passed the decree or made the order, a review of which is applied for, continues or continue attached to the Court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same.

6. (1) Where the application for a review is heard by more than one Judge and the Court is equally divided, the application shall be rejected.

(2) Where there is a majority, the decision shall be according to the opinion of the majority.

7. (1) An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to on the ground that the application was -

(a) in contravention of the provisions of rule 2,

(b) in contravention of the provisions of rule 4. or

(c) after the expiration of the period of limitation prescribed therefor and without sufficient cause.

Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit.

(2) Where the application has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file, and, where it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall

order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same. O. 47.
rr. 7-9.

(3) No order shall be made under sub-rule (2) unless notice of the application has been served on the opposite party.

8. When an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to re-hearing as it thinks fit.
Registry of application granted, and order for re-hearing.

9. No application to review an order made on an application for a review or a decree or order passed or made on a review shall be entertained.
Bar of certain applications.

ORDER XLVIII.

Miscellaneous.

1. (1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs. O. 48.
rr. 1-3
Process to be served at expense of party issuing.

(2) The Court fee chargeable for such service shall be paid within a time to be fixed before the process is issued.
Costs of service.

2. All orders, notices and other documents required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons.
Orders and notices how served.

3. The forms given in the appendices, with such variation as the circumstances of each case may require, shall be used for the purposes therein mentioned.
Use of forms in appendices.

ORDER XLIX.

Chartered High Courts.

O. 49,
rr. 1-3.

1. Notice to produce documents, summonses to witnesses, and every other judicial process, issued in the exercise of the original civil jurisdiction of the High Court, and of its matrimonial testamentary and intestate jurisdictions, except summonses to defendants, writs of execution and notices to respondents may be served by the attorneys in the suits, or by persons employed by them, or by such other persons as the High Court, by any rule or order, directs.

Who may serve process on High Court

2. Nothing in this schedule shall be deemed to limit or otherwise affect any rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court.

Saving in respect of chartered High Court.

3. The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely :—

Application of rules

(1) rule 10 and rule 11, clauses (b) and (c), of Order VII :

(2) rule 3 of Order X ;

(3) rule 2 of Order XVI ;

(4) rules 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, and 16 (so far as relates to the manner of taking evidence) of Order XVIII ;

(5) rules 1 to 8 of Order XX ; and

(6) rule 7 of Order XXXIII (so far as relates to the making of a memorandum) ;

and rule 35 of Order XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction.

ORDER L.

Provincial Small Cause Courts.

1. The provisions hereinafter specified shall not extend **O. 50, r. 1.**
 to Courts constituted under the Provincial Small Cause Courts' Act, 1887, or to
 Courts exercising the jurisdiction of a
 Court of Small Causes under that Act, that is to say—

Provincial Small Cause
 Courts.

(a) so much of this schedule as relates to—

(i) suits excepted from the cognizance of a Court
 of Small Causes or the execution of decrees
 in such suits ;

(ii) the execution of decrees against immoveable
 property or the interest of a partner in
 partnership property ;

(iii) the settlement of issues ; and

(b) the following rules and orders,—

Order II, r. 1 (frame of suit) ;

Orders X, rule 3 (record of examination of parties) ;

Order XV, except so much of rule 4 as provides for
 the pronouncement at once of judgment ;

Order XVIII, rules 5 to 12 (evidence) ;

Orders XLI, to XLV (appeals) ;

Order XLVII, rules 2, 3, 5, 6, 7, (review) ;

Order LI.

ORDER LI.

Presidency Small Cause Courts.

1. Save as provided in rules 22 and 23 of Order V, rules **O. 51, r. 1.**
 4 and 7 of Order XXI, and rule 4 of Order
 XXVI, and by the Presidency Small Cause
 Courts' Act, 1882, this schedule shall not
 extend to any suit or proceeding in any Court of Small Causes
 established in the towns of Calcutta, Madras and Bombay.

Presidency Small Cause
 Courts.

APPENDICES TO THE FIRST SCHEDULE FORMS.

Note.—There are in all eight Appendices to the First Schedule of the Code, giving forms of (A) Pleadings, (B) Process, (C) Discovery, Inspection and Admission, (D) Decree, (E) Execution, (F) Supplemental Proceedings, (G) Appeal, Reference, and Review, and (H) Miscellaneous forms. The following are the *important* Forms :—

APPENDIX A.

PLEADINGS.

Plaints.

No. 1.

MONEY LENT.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , he lent the defendant
rupees repayable on the day of
2. The defendant has not paid the same, except rupees paid
on the day of 19 .
[If the plaintiff claims exemption from any law of limitation, say :—]
3. The plaintiff was a minor (or insane, from the day of
till the day of
4. [Facts showing when the cause of action arose and that the Court has jurisdiction.]
5. The value of the subject-matter of the suit for the purpose of jurisdiction is
rupees and for the purpose of Court-fees is rupees.
6. The plaintiff claims rupees, with interest at per
cent. from the day of 19 .

No. 13.

BREACH OF AGREEMENT TO PURCHASE LAND.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff and
defendant entered into an agreement, and the original document is hereto annexed.
[Or, On the day of 19 , the plaintiff and defendant
mutually agreed that the plaintiff should sell to the defendant and that the defendant
should purchase from the plaintiff forty bighas of land in the village of for
rupees].
2. On the day of 19 , the plaintiff
being then the absolute owner of the property [and the same being free from all
incumbrances as was made to appear to the defendant], tendered to the defendant a
sufficient instrument of transfer of the same (or, was ready and willing, and is still

Forms of Pleadings.

ready and willing and offered, to transfer the same to the defendant by a sufficient instrument] on the payment by the defendant of the sum agreed upon. **App. A.**

3. The defendant has not paid the money.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 14.

NOT DELIVERING GOODS SOLD.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred barrels of flour] to the plaintiff on the day of 19 , and that the plaintiff should pay therefor rupees on delivery.

2. On the [said] day the plaintiff was ready and willing, and offered, to pay the defendant the said sum upon delivery of the goods.

3. The defendant has not delivered the goods, and the plaintiff has been deprived of the profits which would have accrued to him from such delivery.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 31.

FOR MALICIOUS PROSECUTION.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant obtained a warrant of arrest from [a magistrate of the said city, or as the case may be] on a charge of , and the plaintiff was arrested thereon, and imprisoned for [days, or hours] and gave bail in the sum of rupees to obtain his release].

2. In so doing the defendant acted maliciously and without reasonable or probable cause.

3. On the day of 19 , the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff.

4. Many persons, whose names are unknown to the plaintiff, hearing of the arrest, and supposing the plaintiff to be a criminal have ceased to do business with him; or in consequence of the said arrest, the plaintiff lost his situation as clerk to one E. F., or in consequence the plaintiff suffered pain of body and mind, and was prevented from transacting his business, and was injured in his credit, and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 36.

INJUNCTION RESTRAINING NUISANCE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1 Plaintiff is, and at all the times hereinafter mentioned was, the absolute owner of [the house No. , Street, Calcutta].

Forms of Pleadings.

App. A. 2. The defendant is, and at all the said times was, the absolute owner of [a plot of ground in the same street].

3. On the day of 19 , the defendant erected upon his said plot a slaughter-house, and still maintains the same; and from that day until the present time has continually caused cattle to be brought and killed there [and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff].

4. In consequence the plaintiff has been compelled to abandon the said house and has been unable to rent the same.

[As in paras. 4 and 5 of Form No. 1.]

The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further nuisance.

No. 40.

INTERPLEADER.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. Before the date of the claims hereinafter mentioned G. H. deposited with the plaintiff [describe the property] for [safe-keeping].

2. The defendant C. D. claims the same [under an alleged assignment thereof to him from G. H.].

3. The defendant E. F. also claims the same [under an order of G. H. transferring the same to him].

4. The plaintiff is ignorant of the respective rights of the defendants.

5. He has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such persons as the Court shall direct.

6. The suit is not brought by collusion with either of the defendants.

[As in paras. 4 and 5 of Form No. 1.]

9. The plaintiff claims—

(1) That the defendants be restrained, by injunctions, from taking any proceedings against the plaintiff in relation thereto;

(2) that they be required to interplead together concerning their claims to the said property;

(3) [that some person be authorized to receive the said property pending such litigation.]

(4) that upon delivering the same to such [person] the plaintiff be discharged from all liability to either of the defendants in relation thereto.

No. 43.

ADMINISTRATION BY PECUNIARY LEGATEE.

[Note.—There are two forms of a plaint in a suit for administration by a pecuniary legatee. The first form is omitted, and the second is given on the next page.]

Forms of Pleadings.

App. A.

Another form.
(Title.)

E. F., the above-named plaintiff, states as follows:—

1. *A. B.* of *K.* in the died on the day of . By his last will, dated the day of , he appointed the defendant and *M. N.* [who died in the testator's lifetime] his executors, and bequeathed his property, whether moveable or immoveable, to his executors in trust, to pay the rents and income thereof to the plaintiff for his life; and after his decease, and in default of his having a son who should attain twenty-one, or a daughter who should attain that age or marry, upon trust as to his immoveable property for the person who would be the testator's heir-at-law and as to his moveable property for the persons who would be the testator's next-of-kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid.

2. The will was proved by the defendant on the day of . The plaintiff has not been married.

3. The testator was at his death entitled to moveable and immoveable property; the defendant entered into the receipt of the rents of the immoveable property and got in the moveable property; he has sold some part of the immoveable property.

[As in *parus. 4 and 5 of Form No. 1.*]

6. The plaintiff claims—

(1) to have the moveable and immoveable property of *A. B.* administered in this Court, and for that purpose to have all proper directions given and accounts taken;

(2) such further or other relief as the nature of the case may require.

No. 45.

FORECLOSURE OR SALE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is mortgagee of lands belonging to the defendant.

2. The following are the particulars of the mortgage:—

(a) (date);

(b) (names of mortgagor and mortgagee);

(c) (sum secured);

(d) (rate of interest);

(e) (property subject to mortgage);

(f) (amount now due);

(g) (if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims).

(If the plaintiff is mortgagee in possession, add)

3. The plaintiff took possession of the mortgaged property on the day of and is ready to account as mortgagee in possession from that time
[As in *parus. 4 and 5 of Form No. 1.*]

6. The plaintiff claims—

(1) payment, or in default [sale or] foreclosure [and possession];

[Where Order 34, rule 6 applies.]

(2) in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff, then that liberty be reserved to the plaintiff to apply for a decree for the balance.

Forms of Pleadings.

App. A.

No. 46.

REDEMPTION.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is mortgagor of lands of which the defendant is mortgagee.
2. The following are the particulars of the mortgage :—
 - (a) (date) ;
 - (b) (names of mortgagor and mortgagee) ;
 - (c) (sum secured) ;
 - (d) (rate of interest) ;
 - (e) (property subject to mortgage) ;
 - (f) *(If the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims).*
 - (If the defendant is mortgagee in possession, add)*
3. The defendant has taken possession [or has received the rents] of the mortgaged property

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims to redeem the said property and to have the same re-conveyed to him [and to have possession thereof].

No. 47.

SPECIFIC PERFORMANCE (No. 1).

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. By an agreement, dated the day of and signed by the defendant, he contracted to buy off [or sell to] the plaintiff's certain immoveable property therein described and referred to, for the sum of rupees.
2. The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so.
3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [or to accept a transfer and possession of the said property] and to pay the costs of the suit.

No. 49.

PARTNERSHIP.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. He and *C. D.*, the defendant, have been for years [or months] past carrying on business together under articles of partnership in writing [or under a deed, or under a verbal agreement].
2. Several disputes and differences have arisen between the plaintiff and defendant as such partners whereby it has become impossible to carry on the business in partner-

Forms of Pleadings.

ship with advantage to the partners. [Or the defendant has committed the following breaches of the partnership articles :—

- (1)
- (2)
- (3)

[As in paras. 4 and 5 of Form No. 1.]

5. The plaintiff claims—

- (1) dissolution of the partnership ;
- (2) that accounts be taken ;
- (3) that a receiver be appointed.

(N.B.—In suits for the winding-up of any partnership, omit the claim for dissolution ; and instead insert a paragraph stating the facts of the partnership having been dissolved.)

Written Statements.

No. 13.

DEFENCE TO SUIT FOR SPECIFIC PERFORMANCE.

1. The defendant did not enter into the agreement.
2. A. B. was not the agent of the defendant (if alleged by plaintiff).
3. The plaintiff has not performed the following conditions—(Conditions).
4. The defendants did not—(alleged acts of part performance).
5. The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reasons of the following matter—(State why).
6. The agreement is uncertain in the following respects—(State them).
7. (or) The plaintiff has been guilty of delay ;
8. (or) The plaintiff has been guilty of fraud (or misrepresentation).
9. (or) The agreement is unfair.
10. (or) The agreement was entered into by mistake.
11. The following are particulars of (7), (8), (9), (10) (or as the case may be).
12. The agreement was rescinded under Conditions of Sale, No. 11 (or by mutual agreement).

(In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches, or show whatever other ground of defence he intends to rely on, e.g., the Indian Limitation Act, accord and satisfaction, release, fraud, etc.)

APPENDIX B.

PROCESS.

No. 1.

SUMMONS FOR DISPOSAL OF SUIT. (O. 5, rr. 1. 5.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS

has instituted a suit against you for
you are hereby summoned to appear in this Court in person or by a pleader duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions, on the
day of 19 , at o'clock in the noon, to answer
the claim; and as the day fixed for your appearance is appointed for the final disposal of the suit, you must be prepared to produce on that day all the witnesses upon whose evidence and all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

- NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call upon the witness to produce, on applying to the Court and on depositing the necessary expenses.
2. If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree which may be against your person or property, or both.
-

APPENDIX C.

DISCOVERY, INSPECTION AND ADMISSION.

No. 4.

ORDER FOR AFFIDAVIT AS TO DOCUMENTS. (O. 11, r. 12.)

(Title as in No. 1, *supra*.)

Upon hearing
It is ordered that the do within days from the date
of this order, answer on affidavit stating which documents are or have been in his
possession or power relating to the matter in question in this suit and that the costs of
this application be

No 5.

AFFIDAVIT AS TO DOCUMENTS. (O. 11, r. 13.)

(Title as in No. 1, *supra*.)

I, the above-named defendant, C. D., make oath and say as follows :—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the first schedule hereto [*state grounds of objection*].

3. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

4. The last-mentioned documents were last in my possession or power on [*state when and what has become of them, and in whose possession they now are*].

5. According to the best of my knowledge, information and belief I have not now and never had, in my possession, custody or power or in the possession, custody or power of my pleader or agent, or in the possession, custody or power of any other person on my behalf, any account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit or any of them, or wherein any entry has been made relative to such matters or any of them other than and except the documents set forth in the said first and second schedules hereto.

— — — — —

APPENDIX D.

DECREES.

No. 2.

SIMPLE MONEY DECREE. (Section 34.)

(Title.)

Claim for

This suit coming on this day for final disposal before _____ in the
 presence of _____ for the plaintiff and of _____ for the
 defendant, it is ordered that the _____ do pay to the _____ the
 sum of Rs. _____ with interest thereon at the rate of _____ per cent.
 per annum from _____ to the date of realization of the said sum and do also pay
 Rs. _____, the costs of this suit with interest thereon at the rate of
 _____ per cent. per annum from this date to the date of realization.

GIVEN under my hand and the seal of the Court, this _____ day of

19

Judge.

Costs of Suit.

Plaintiff.				Defendant.			
	Rs.	A.	P.		Rs.	A.	P.
1. Stamp for plaint ..				Stamp for power ..			
2. Do. for power ..				Do. for petition ..			
3. Do. for exhibit ..				Pleader's fee ..			
Pleader's fee on Rs. ..				Subsistence for wit- nesses ..			
Subsistence for wit- nesses ..				Service of process ..			
Commissioner's fee ..				Commissioner's fee ..			
Service of process ..							
Total ..				Total ..			

No. 3.

PRELIMINARY DECREE FOR FORECLOSURE. (O. 34, r. 2.)

(Title.)

This suit coming on this day, etc.; It is hereby declared that the amount due to
 the plaintiff on account of principal, interest and costs calculated up to the
 day of _____ 19____, is Rs. _____;

and it is decreed as follows:—

(1) That if the defendant pays into Court the amount so declared due on or before
 the said _____ day of _____ 19____, the plaintiff shall deliver up

Forms of Decrees.

App. D.

to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him. [Where the plaintiff claims by derived title add *or by those under whom he claims.*] [Where the plaintiff is in possession add *and shall put the defendant in possession of the property.*]

(2) That if such payment is not made on or before the said _____ day of _____ 19____ the defendant shall be debarred from all right to redeem the property.

*Schedule.**Description of the mortgaged property.*

— — —

No. 4.

PRELIMINARY DECREE FOR SALE. (O. 34, r. 4.)

(Title.)

This suit coming on this day, etc. : It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of _____ 19____ is Rs. _____ and that such amount shall carry interest at the rate of _____ per cent. per annum until realization ; and it is decreed as follows :—

(1) That if the defendant pays into Court the amount so declared due on or before the said _____ day of _____ 19____, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him. [Where the plaintiff claims by derived title add *or by those under whom he claims.*] [Where the plaintiff is in possession add *and shall put the defendant in possession of the property.*]

(2) That if such payment is not made on or before the said _____ day of _____ 19____, the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest and subsequent cost, and that the balance if any be paid to the defendant.

(3) That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

*Schedule.**Description of the mortgaged property.*

— — — — —

No. 5.

PRELIMINARY DECREE FOR REDEMPTION. (O. 34, r. 7.)

(Title.)

This suit coming on this day, etc. ; It is hereby declared that the amount due to the defendant on account of principal, interest and costs calculated up to the

Forms of Decrees.

App. D. day of 19 is Rs. :
and it is decreed as follows :—

(1) That if the plaintiff pays into Court the amount so declared due on or before the said day of 19, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him. [Where the defendant claims by derived title add *or by those under whom he claims.*] [Where the defendant is in possession add *and shall put the plaintiff in possession of the property.*]

(2) That if such payment is not made on or before the said day of 19, the plaintiff shall be debarred from all right to redeem the property. [If the mortgage is simple or usufructuary substitute *the property shall be sold.*]

*Schedule.**Description of the mortgaged property.*

No. 10.

FINAL DECREE FOR FORECLOSURE. (O. 34, r. 3.)

(Title.)

Upon reading the decree passed in the above suit on the day of 19, and the application of the plaintiff dated the day of 19 and after hearing pleader for the plaintiff and pleader for the defendant, and it appearing that the payment directed by the said decree has not been made :

It is hereby decreed as follows :—

That the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property set out and described in the schedule hereunto annexed. [Where the defendant is in possession add *and shall put the plaintiff in possession of the said property.*]

*Schedule.**Description of the mortgaged property.*

No. 21.

PRELIMINARY DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP
AND THE TAKING OF PARTNERSHIP ACCOUNTS.

(Title.)

It is declared that the proportionate shares of the parties in the partnership are as follows :—

It is declared that this partnership shall stand dissolved [or shall be deemed to have been dissolved] as from the day of and it is ordered that the dissolution thereof as from that day be advertised in the (Gazette. etc.

And it is ordered that be the receiver of the partnership-estate and effects in this suit and do get in all the outstanding book-debts and claims of the partnership.

Forms of Decrees.

App. D.

And it is ordered that the following accounts be taken :—

1. An account of the credits, property and effects now belonging to the said partnership ;
2. An account of the debts and liabilities of the said partnership ;
3. An account of all dealings and transactions between the plaintiff and defendant, from the foot of the settled account exhibited in this suit and marked (A), and not disturbing any subsequent settled accounts.

And it is ordered that the good-will of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned, and the stock-in-trade, be sold on the premises, and that the * may, on the application of any of the parties, fix a reserved bidding for all or any of the lots at such sale, and that either of the parties is to be at liberty to bid at the sale.

And it is ordered that the above accounts be taken, and all the other acts required to be done be completed, before the day of , and that the * do certify the result of the accounts, and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of .

And, lastly, it is ordered that this suit stand adjourned for making a final decree to the day of

No. 22.

FINAL DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND
THE TAKING OF PARTNERSHIP ACCOUNTS.

(Title.)

It is ordered that the fund now in Court, amounting to the sum of Rs. be applied as follows :—

1. In payment of the debts due by the partnership set forth in the certificate of the * amounting on the whole to Rs.

2. In payment of the costs of all parties in this suit, amounting to Rs.

[These Costs must be ascertained before the decree is drawn up.]

3. In payment of the sum of Rs. to the plaintiff as his share of the partnership-assets, of the sum of Rs. , being the residue of the said sum of Rs. now in Court, to the defendant as his share of the partnership-assets.

[Or, and that the remainder of the said sum of Rs. be paid to the said plaintiff [or defendant] in part payment of the sum of Rs. certified to be due to him in respect of the partnership-accounts.]

4. And that the defendant [or plaintiff] do on or before the day of pay to the plaintiff [or defendant] the sum of Rs. being the balance of the said sum of Rs. due to him which will then remain due.

* Here insert name of proper officer.

APPENDIX E.

EXECUTION.

No. 6.

APPLICATION FOR EXECUTION OF DECREE. (O. 21, r 11.)

In the Court of

I, , decree-holder, hereby apply for execution of the decree herein below set forth :—

No. of suit	Names of parties.	Date of decree.	Whether any appeal preferred from decree.	Payment or adjustment made, in any.	Previous application, if any, with date and result.	Amount with interest due upon the decree or other relief granted thereby together with particulars of any cross-decree.	Amount of costs, if any, awarded.	Against whom to be executed.	Mode in which the assistance of the Court is required.				
1	2	3	4	5	6	7	8	9	10				
789 of 1897.	A. B.—Plaintiff C. D.—Defendant	October 11th, 1897.	No.	None.	Rs. 72-4 recorded on application, dated the 4th March, 1899.	Rs. 314-8-2 principal [interest at 6 per cent. per annum, from date of decree till payment].	<table border="1"> <tr> <th>Rs. a. p.</th> </tr> <tr> <td>As awarded in the decree</td> </tr> <tr> <td>Subsequently incurred</td> </tr> <tr> <td>Total ..55 12 4</td> </tr> </table>	Rs. a. p.	As awarded in the decree	Subsequently incurred	Total ..55 12 4	Against the defendant (C. D.).	<p>[When attachment and sale of moveable property is sought.]</p> <p>I pray that the total amount of Rs. [together with interest on the principal sum up to date of payment] and the costs of taking out this execution, be realized by attachment and sale of defendant's moveable property as per annexed list and paid to me.</p> <p>[When attachment and sale of immovable property is sought.]</p> <p>I pray that the total amount of Rs. [together with interest on the principal sum up to date of payment] and the costs of taking out this execution, be realized by the attachment and sale of defendant's immovable property specified at the foot of this application and paid to me.</p>
Rs. a. p.													
As awarded in the decree													
Subsequently incurred													
Total ..55 12 4													

Forms of Execution.

declare that what is stated herein is true to the best of my knowledge and belief. **App. E.**

Dated the day of 19 *Signed* , *Decree-holder.*

[When attachment and sale of immoveable property is sought.]

Description and Specification of Property.

The undivided one-third share of the judgment-debtor in a house situated in the village of value Rs. 40 and bounded as follows:—

East by G's house; west by H's house; south by public road; north by private lane and J's house

I declare that what is stated in the above description is true to the best of my knowledge and belief, and so far as I have been able to ascertain the interest of the defendant in the property therein specified.

(Signed) , *Decree-holder.*

APPENDIX G.

APPEAL, REFERENCE AND REVIEW.

No. 1.

MEMORANDUM OF APPEAL. (O. 41, r. 1.)

(Title.)

The above-named appeals to the
Court at from the decree of
in suit No. of 19 , dated the
day of 19 , and sets forth the following grounds of
objection to the decree appealed from, namely:—

No. 8.

MEMORANDUM OF CROSS-OBJECTION. (O. 41, r. 22.)

(Title.)

WHEREAS the has preferred an appeal to the
Court at from the decree of
in Suit No. of 19 , dated the
day of 19 and whereas notice of the day fixed
for hearing the appeal was served on the on the
day of 19 , the files this memorandum of cross-objec-
tion under rule 22 of Order XLI of the Code of Civil Procedure, 1908, and set forth the
following grounds of objection to the decree appealed from, namely:—

THE SECOND SCHEDULE.

ARBITRATION.

Arbitration in Suits.

1. (1) Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference.

Parties to suit may apply for order of reference.

(2) Every such application shall be in writing and shall state the matter sought to be referred.

The three divisions of this schedule.—This Schedule deals with arbitration under three heads (a) :—

I. Where a suit has been instituted and all the parties interested agree to refer to arbitration any matter in difference between them in the suit. In that case all proceedings from first to last are under the supervision of the Court, and they are governed by the provisions of paras. 1 to 16 of this Schedule. The first step is to apply to the Court for an order of reference under para. 1. If all the parties interested have joined in the application, an order of reference will be made under para. 3. See paras. 1 to 16.

II. Where parties without having recourse to litigation agree to refer their differences to arbitration and it is desired that the agreement of reference should have the sanction of the Court. In that case the parties to the agreement or any of them may apply to the Court under para. 17 to have the agreement filed in Court and to make an order of reference thereon. If an order of reference is made, all further proceedings will be under the supervision of the Court, and they will be governed by the provisions of paras. 3 to 16 so far as they are consistent with the agreement (para. 19) See paras. 17 to 19.

III. Where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court and the assistance of the Court is only sought in order to give effect to the award. In that case any person interested in the award may apply to the Court under para. 20 to have the award filed in Court. See paras. 20-21.

Application to be in writing.—The application should be in writing, but it need not be signed (v). As to the form of the application, see Form No. 1 to the Appendix to this Schedule.

All the parties interested must join in the application.—In order to give jurisdiction to the Court to make an order of reference under this and para. 3, it is necessary that all the parties interested must apply to the Court (w). If all the parties interested do not apply, and an order of reference is made, the order is illegal, and if an award is made on such reference, the award also is illegal (x). Thus where in a suit for partnership accounts brought by A against B and C, A and B alone applied to the Court to refer the matters in dispute to arbitration, and an order of reference was made, it was

(v) *Gulam Khan v. Muhammad Hassan* (1902)

20 Cal. 167, 29 I. A. 51.

(w) *Umed Singh v. Subhay Mal* (1916) 43 Cal.

200, 43 I. A. 1.

(w) See 20 Cal. 167, *supra*.

(x) *Joy Prokash v. Sheo Golam* (1885) 11 Cal. 37.

Arbitration.

held, on an objection raised by *B* to the validity of the award, that *C* not having joined in the application, the order of reference as also the award made in pursuance thereof were illegal (*y*). Sch. II,
paras. 1-3.

The word "interested" is new. It has been added to give effect to a recent Allahabad decision (*z*). It refers to the succeeding words "any matter in difference between them." A party to a suit who is not interested in a matter in difference between the other parties to the suit need not join in an application under this paragraph for an order of reference. *A* sues *B* and *C*, praying as against *B* for a declaration of his title to certain property and as against *C* for possession of the property. *A* and *B* alone apply to the Court to refer to arbitration the question as to the ownership of the property. The Court has jurisdiction to make an order of reference, though *C* has not joined in the application, for the question of ownership is not in issue between *A* and *C*. But *C* not being a party to the reference, the award will not be binding upon him, though it will be binding as between *A* and *B* (*a*). There is a conflict of decisions as to whether a defendant who does not put in an appearance and does not contest the suit is a party "interested" within the meaning of this paragraph. On the one hand, it had been held that such a defendant is not a party "interested", and the fact, therefore, that he has not joined in the application for an order of reference will not invalidate an award (*b*). On the other hand it has been held that he is a party "interested" and the fact, therefore, that he has not joined in the application to refer to arbitration will invalidate the award (*c*). However that may be, it is clear that a person who is not a necessary party to a suit is not a party "interested" within the meaning of this para. (*d*).

Appointmēt of arbitra-
tor. 2. The arbitrator shall be appointed in such manner as may be agreed upon between the parties.

Order of reference. 3. (1) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order.

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this Schedule, deal with such matter in the same suit.

Fixing of time for the making of award.—The present paragraph provides that the Court shall fix a reasonable time for the making of the award and specify such time in the order of reference. Paragraph 8 enables the Court from time to time to enlarge the period for making the award. Paragraph 15 provides that an award made after the expiration of the period allowed by the Court may be set aside by the Court

(y) *Indur Subbawani v. Kandadui* (1903) 26 Mad. 47.

(z) *Pitām Mal v. Sadiq Ali* (1902) 24 All. 229.

(a) *Bishoka v. Anunto* (1879) 4 C. L. R. 65.

(b) *Pitām Mal v. Sadiq Ali* (1902) 24 All. 229;

Ishardas v. Keshab Deo (1910) 32 All. 657.

(c) *Sabta Prasad v. Dharam* (1911) 8 All. L. J. 646. See also *Ajudhia Prasad v. Badar-w-*

Husain (1917) 39 All. 480

(d) *Sabta v. Dharam* (1912) 35 All. 107.

Arbitration.

Sch. II, The provision contained in this paragraph requiring the Court to fix a reasonable time for the making of the award is not merely directory, but imperative. Hence the provision should be strictly followed. At the same time it has been held that if no time is fixed for delivery of the award in the order of reference, but the Court subsequently makes an order for enlarging the time (para. 8), and fixes in that order the time within which the award should be made, the omission to fix the time in the order of reference is not fatal to the award (e). See para. 15, cl. (1), sub-cl. (c).

Clause (2).—Where a matter is referred to arbitration, the Court should not deal with it in the same suit except in the manner provided in this Schedule. Hence the Court has no power to grant permission to the plaintiff to withdraw from the suit with liberty to bring a fresh suit, for there is no paragraph in this Schedule corresponding to O. 23, r. 1 (f). Nor can the Court revoke the authority of the arbitrator and appoint a new arbitrator except in the cases specified in paragraph (3) (g). Nor is it open to the Court to hear the suit on the merits, unless the arbitration has been superseded under para. 5, 8 or 15 (h).

4. (1) Where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—

Where reference is to two or more, order to provide for difference of opinion.

- (a) by the appointment of an umpire; or
- (b) by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail; or
- (c) by empowering the arbitrators to appoint an umpire; or
- (d) otherwise as may be agreed between the parties or, if they cannot agree, as the Court may determine.

(2) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is required to act.

Empowering arbitrators to appoint an umpire.—The arbitrators have no power to appoint an umpire, unless they are authorized in that behalf (i).

Power of Court to appoint arbitrator in certain cases.

5. (1) In any of the following cases, namely:—

- (a) where the parties cannot agree within a reasonable time with respect to the appointment of an

(e) *Raja Har Narain v. Chaudhrai Bhagwant Kaur* (1891) 13 All. 300, 18 L. A. 55; *Lachman Das v. Abjarkash* (1903) 30 All. 100.

(f) *Sheoambar v. Deodul* (1887) 9 All. 108; *Debi*

Churn v. Bipra (1902) 7 Cal. W. N. 186.

(g) *Hatimbhai v. Shanker* (1880) 10 Bom. 531.

(h) *Jamna v. Nasib* (1902) 24 All. 312.

(i) *Smith v. Lutha* (1893) 17 Bom. 129.

Arbitration.

arbitrator, or the person appointed refuses to accept the office of arbitrator, or Sch. II,
paras. 5, 6.

(b) where an arbitrator or umpire—

(i) dies, or

(ii) refuses or neglects to act or becomes incapable of acting, or

(iii) leaves British India in circumstances showing that he will probably not return at an early date, or

(c) where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so,

any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or umpire.

(2) If, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator or no umpire is appointed, as the case may be, the Court may on application, by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire or make an order superseding the arbitration, and in such case shall proceed with the suit.

Duty of Court under this paragraph.—In the event of the happening of any of the events mentioned in this paragraph, the Court *must* adopt one of the two courses pointed out in the paragraph, namely, appoint a new arbitrator, or make an order superseding the arbitration. Thus where one of three arbitrators refused to act, and the Court neither appointed a new arbitrator nor made an order superseding the arbitration, it was held that the award made by the other two arbitrators was invalid (j).

Order superseding arbitration.—When once a matter is referred to arbitration by an order of the Court, the Court has no power to hear the suit on the merits, unless the arbitration has been superseded by an order under this paragraph (k) or under paragraph 8 or 15.

6. Every arbitrator or umpire appointed under paragraph 4 or paragraph 5 shall have the like powers as if his name had been inserted in the order of reference.

Powers of arbitrator or umpire appointed under paragraph 4 or 5.

(j) *Nand Ram v. Fakir Chand* (1885) 7 All. 523; 113.
Thammairaju v. Bapiraju (1889) 12 Mad. | (k) *Jamna v. Nasib Ali* (1902) 24 All. 312.

Arbitration.

Sch. II,
paras.
7-11.

7. (1) The Court shall issue the same processes to the parties and witnesses whom the arbitrator or umpire desires to examine, as the Court may issue in suits tried before it.

(2) Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties and punishments, by order of the Court on the representation of the arbitrator or umpire as they would incur for the like offences in suits tried before the Court.

8. Where the arbitrators or the umpire cannot complete the award within the period specified in the order the Court may, if it think fit, either allow further time, and from time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period; or may make an order superseding the arbitration, and in such case shall proceed with the suit.

9. Where an umpire has been appointed, he may enter on the reference in the place of the arbitrators,—

- (a) if they have allowed the appointed time to expire without making an award, or
- (b) if they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree.

10. Where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court together with any deposition and documents which have been taken and proved before them; and notice of the filing shall be given to the parties.

11. Upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court, state the award as to the whole or any part thereof in the form of

Summoming witnesses and default

Extension of time for making award

Where umpire may arbitrate in lieu of arbitrators

Award to be signed and filed

Statement of special case arbitrators or umpire

Arbitration.

a special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and shall order such opinion to be added to and to form part of the award.

Sch. II,
paras.
11-14.

Power to modify or correct award

✓ 12. The Court may, by order, modify or correct an award,—

- (a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred ; or
- (b) where the award is imperfect in form, or contains any obvious error which can be amended without effecting such decision : or
- (c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

Order as to costs of arbitration

13. The Court may also make such order as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

Where award or matter referred to arbitration may be remitted

14. The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrator or umpire, upon such terms as it thinks fit,—

- (a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred ;
- (b) where the award is so indefinite as to be incapable of execution ;
- (c) where an objection to the legality of the award is apparent upon the face of it.

Arbitration.

Sch. II, paras. 14, 15. **Remission of award when the award has left undetermined any of the matters referred to arbitration.**—Thus where several issues in a suit are referred to arbitration, and the arbitrator decides by the award only one issue, the award must be remitted to his reconsideration (l). If the arbitrator fails to reconsider the award, the award becomes void : see paragraph 15.

15. (1) An award remitted under paragraph 14 becomes void on failure of the arbitrator or umpire to reconsider it. But no award shall be set aside except on one of the following grounds, namely :—

(Grounds for setting aside award.)

- (a) corruption or misconduct of the arbitrator or umpire;
- (b) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire ;
- (c) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid.

(2) Where an award becomes void or is set aside under clause (1), the Court shall make an order superseding the arbitration and in such case shall proceed with the suit.

Misconduct.—The term “misconduct” does not necessarily imply moral turpitude ; it includes neglect of the duties and responsibilities of the arbitrators, and of what Courts of Justice expect from them before allowing finality to their awards (m). Nor does it necessarily imply corruption (n).

Acts amounting to misconduct.—The following acts have been held to amount to “misconduct” on the part of an arbitrator affording a ground for setting aside an award :—

1. Irregularities in procedure which amount to no proper hearing of the matters in dispute (o), e.g., hearing and receiving evidence from one side in the absence of the other side without giving the other side affected by such evidence, the opportunity of meeting and answering it (p).
2. Proceeding with arbitration in the absence of one of the arbitrators (q).

(l) *Jonardan v. Sambhu v. Nath* (1889) 16 Cal. 806.

(m) *Ganga Sahai v. Lekhraj* (1887) 9 All. 253.

(n) *Kali Charan v. Sarat Chunder* (1903) 30 Cal. 397.

(o) *Unur Bequet v. Badr-ud-din* (1914) 36 All. 536, 543 [P. C.]

(p) *Cursetji v. W. Crowder* (1894) 18 Bom. 299.

(q) *Thammiraju v. Bapiraju* (1889) 12 Mad 113 ;
Nand Ram v. Faki Chand (1885) 7 All. 525.

3. Refusing to hear witnesses produced by the parties (*r*).
4. Arbitrators improperly adding another to their number (*s*).
5. Where three out of five arbitrators were not present at the time the award was made and did not sign the award, although it purported to be signed by all of them, it was held that it amounted to misconduct and the award was set aside (*t*).

Sch. II,
paras.
15, 16.

Evidence of arbitrator.—Where a charge of dishonesty or partiality is made against an arbitrator, any relevant evidence he can give is properly admissible. It is, however, necessary to take care that evidence admitted as relevant on such charges is not used for a different purpose, namely, to scrutinize the decision of the arbitrator on matters within his jurisdiction and in which his decision is final (*v*).

Fraudulent concealment of any matter which ought to have been disclosed.—Where the arbitrator was the retained pleader of the plaintiff, and this fact was not disclosed by the plaintiff to the defendant before the arbitrator was appointed, the award was set aside on the ground that that fact was one which ought to have been disclosed. Every disclosure which might in the least affect the minds of those who are proposing to submit their dispute to the arbitration of any particular individual as regards his selection and fitness for the post ought to be made, so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made (*v*).

Award made after the issue of order superseding arbitration.—If an order is made superseding the arbitration under paragraph 5 or 8 or under cl. (2) of this paragraph, or if the period fixed for making the award has expired, the arbitrators have no longer seisin of the reference, and they are *functi officio*, and cease to have any more power to make an award than the man in the street (*w*). Similarly an arbitrator is *functus officio* after the award is made, and he cannot thereafter add to or alter the award (*x*).

16. (1) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for re-consideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award.

Judgment to be according to award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award.

(*r*) *Rughoobar v. Mainu Koer* (1863) 12 C.L.R. 361.

(*s*) *Phiran v. Bahoran* (1875) 7 N. W. P. 367.

(*t*) *Ram Narain v. Baij Nath* (1902) 29 Cal. 36.

(*v*) *Amir Begum v. Badr-ud-din* (1914) 30 All.

336, 343 [P. G.]

(*v*) *Kali Prasanno v. Rajani Kant* (1888) 25 Cal. 142.

(*w*) *Ibrahim v. Mohsin* (1890) 18 All. 422, 425.

(*x*) *Jafri Begam v. Syed Ali Raza* (1901) 23 All. 383, 28 L. A. 111.

Arbitration.

Sch. II, "After the time for making such application has expired,"—That is, after 10 days from the date on which the award is submitted to the Court; see Limitation Act, 1908, sch. I, art. 138.

paras.
16, 17.

No appeal lies from a decree based on an award except in so far as such decree is in excess of or not in accordance with the award.—In references to arbitration the general rule is that, as the parties choose their own arbitrator to be the judge in the disputes between them, they cannot object to his decision either upon the law or upon the facts. It is now well established that where a matter is referred to an arbitrator, he is the sole and final judge of all questions not only of fact, but of law (y). Thus where an award was impeached on the ground that it was against law, their Lordships of the Privy Council said: "They [arbitrators] may have erred in law, but arbitrators may be judges of law as well as judges of fact, and an error in law certainly does not vitiate an award" (z), and this principle has been carried so far that if parties submit to an arbitrator, the decision of a bare point of law, and he gives an erroneous decision, his award is binding notwithstanding (a). In all these cases the Court would say to the party seeking to set aside the award: "You have constituted your own tribunal; you are bound by its decision" (b). The present paragraph gives effect to "the principle of finality" of awards, by declaring that no appeal shall lie from a decree based on an award, except in so far as the decree is in excess of, or not in accordance with, the award (c). The only cases in which the Code allows an appeal from a decree based on an award are—

- (1) where the decree is *in excess* of the award, as where the decree gives interest which the arbitrators have not awarded (d); or
- (2) where the decree is *not in accordance with* the award.

Order of reference on agreement to refer.

17. (1) Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement or any of them, may apply to any Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(y) *Adams v. Great North of Scotland Ry. Co.*, [1881] A. C. 31.

(z) *Ghulam Khan v. Muhammad Hussain* (1902) 29 Cal. 187, 20 I. A. 51.

(a) *Steff v. Andrews* (1816) 2 Madd. 6.

(b) *Per Williams, J., in Hodgkinson v. Perrie*

(1857) 3 C. B., N. S. 189.

(c) *Gulam Khan v. Muhammad Hussain* (1902) 29 Cal. 187, 20 I. A. 51; *Hansraj v. Sundar Lal* (1908) 35 Cal. 648, 35 I. A. 88.

(d) *Mohan Lal v. Joy Narain* (1874) 23 W. R. 105.

Arbitration.

(3) On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

Sch. II,
'paras.
17, 18.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator.

Second division.—This is the second of the three divisions of this Schedule noted in the commentary on paragraph 1 above.

Does not apply.—The procedure prescribed by this paragraph does not apply to cases to which the Arbitration Act applies. See notes to s. 89.

Scope of the paragraph.—Paras. 1 to 16 deal with cases in which the parties to a suit agree to refer the matters in difference between them in the suit to arbitration and apply to the Court for an order of reference. The application in such a case must be made by all the parties to the suit interested in the matters in difference proposed to be referred to arbitration. This and the subsequent paragraph refer to cases in which persons themselves agree, independently of the Court, to refer the matters in difference between them to arbitration. In such a case any party to the agreement may apply to the Court to have the agreement filed and to have an order of reference made thereon. Where such an order is made, the provisions of paras. 2 to 16 apply to the proceedings in so far as they are consistent with the agreement so filed (e) [see para. 19]. When a submission is filed in Court under this paragraph, the submission is said to be made a rule of the Court.

18. Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the Court to stay the suit; and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to

Stay of suit where there is an agreement to refer to arbitration.

Arbitration.

Sch. II, paras. 18-20. do all things necessary to the proper conduct of the arbitration, may make an order staying the suit.

"Institutes any suit."—These words show that the present rule refers only to suits instituted *after* the agreement to refer to arbitration has been made. *A* sues *B* in respect of certain matters. The parties then agree to refer the matters to arbitration. Subsequently *A* declines to proceed with the arbitration, and writes to *B* that he will proceed with the suit. *B* applies for an order staying the suit. The Court has no power under this rule to stay the suit, for the suit was instituted *prior* to the agreement (*f*).

19. The foregoing provisions, so far as they are consistent with any agreement filed under paragraph 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to the decree following thereon.

Provisions applicable to proceedings under paragraph 17.

Does not apply.—This paragraph does not apply to cases to which the Arbitration Act applies. See notes to s. 59.

"So far as they are consistent with any agreement filed under paragraph 17."—This paragraph provides that where an order of reference is made under paragraph 17, the provisions of paras. 3 to 16 shall apply to all proceedings under the order *only so far as they are consistent with the agreement filed under paragraph 17*. Thus under paragraph 8 the Court has the power to extend the period for the making of the award. But if the agreement filed under paragraph 17 provides that the arbitrators shall make their award within a fixed period and that they shall have no power to enlarge the time for making the award, the stipulation in the agreement will prevail to the exclusion of the provision in paragraph 8. But the words "so far as they are consistent with any agreement filed under paragraph 17" would not preclude the Court from setting aside an award for misconduct of the arbitrators, though there may be a clause in the agreement that the award should be accepted as "final" (*g*). Nor do they preclude the Court from appointing a new arbitrator under paragraph 5 in place of one who refuses to act, provided there is no clause in the submission expressly excluding the power of the Court to make such an appointment (*h*).

Arbitration without the intervention of a Court.

20. (1) Where any matter has been referred to arbitration without the intervention of a Court, and an award has been made thereon, any person interested in the award may apply

Filing award in matter referred to arbitration without intervention of Court.

(*f*) *Ramjidas v. House* (1907) 35 Cal. 199; *Peruri v. Gollapudi* (1909) 34 Bom. 372, both cases under s. c. 19 of the Arbitration Act. (*g*) *Burla v. Kalapali* (1883) 6 Mad. 368. (*h*) *Bulu v. Seetharama* (1894) 17 Mad. 498.

Arbitration.

to any Court having jurisdiction over the subject matter of the award that the award be filed in Court. **Sch. II, para. 20.**

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(3) The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

Third division.—This is the last of the three divisions of this schedule noted in the commentary on paragraph 1 above.

Does not apply.—This paragraph does not apply to cases to which the Arbitration Act applies. See notes to s. 50.

Scope of this and subsequent paragraph.—The present paragraph and paragraph 21 refer to cases where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court, and the assistance of the Court is only sought in order to give effect to the award (i).

The paragraph is no bar to a regular suit to enforce an award.—A party interested in an award may *at his option* avail himself of the summary remedy provided by this paragraph to enforce the award, or he may bring a regular suit to enforce the award (j).

“Where any matter has been referred to arbitration.”—*Do the words “any matter” refer only to a matter in respect of which a suit can be entertained by a Civil Court under s. 9 of the Code?*—This paragraph provides that when *any matter* has been referred to arbitration without the intervention of a Court, and an award has been made thereon, any person interested in the award may apply that the award be filed in Court. Paragraph 21 provides for the passing of a decree on the award. Suppose now that the *matter* referred to arbitration is one as to which a Civil Court has no jurisdiction to entertain a suit under s. 9 of the Code, e.g., disputes about *man pan*, and an award is made thereon. Has the Court jurisdiction to file such an award and pass a decree thereon under paragraph 21? It has been held by the High Court of Bombay that it has, and that it is not against the policy of the law to give effect to such awards (k). The result is that rights which are not at all civil rights may be the subject-matter of an arbitration and award and of the decree of a Civil Court. It is, however, different where a matter is such that on grounds of *public policy* it can be disposed of only by a Court, in such a case it cannot form the legitimate subject of a reference, and if such a matter is referred to arbitration and an award has been made thereon, the Courts should refuse to pass a decree thereon. Thus the right to succeed to the trusteeship of a *public charitable trust* is not a right which can be settled by *arbitration*. A Court therefore has no jurisdiction to entertain an application to file an award in such a matter under this paragraph (l).

(i) *Gulam Khan v. Muhammad Hasan* (1902) 29 Cal. 107, 182, 29 I. A. 51.
(j) *Subbaray v. Subbaraya* (1907) 20 Mad. 400.

(k) *Raghavendra v. Gururao* (1913) 37 Bom. 442.
(l) *Muhammad Ibrahim v. Ahmad* (1910) 32 All. 510.

Arbitration.

Sch. II,
paras.
21-23.

21. (1) Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

Filing and enforcement
of such award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

Does not apply.—This paragraph does not apply to cases to which the Arbitration Act applies. See notes to s. 89.

Grounds of objection under paras. 14 and 15.—Where a matter has been referred to arbitration *under an order of the Court*, the Court has power in the cases mentioned in para. 14 to remit the award to the reconsideration of the arbitrator. Thus if an award determines any matter not referred to arbitration, the Court may remit the award under para. 14; and if such matter can be separated without affecting the determination of the matters referred, the Court may amend the award by striking out that portion of the award which is in excess of the reference, and enforce the award as to the rest of it. But where a matter has been referred to arbitration *without the intervention of the Court*, the Court has no power to remit or to amend the award. The Court has under the present para. only two courses open to it, namely, to file the award or refuse to file the award [see para. 21]. Hence if an award in a matter referred to arbitration *without the intervention of the Court* determines matters not referred to arbitration, the only course open to the Court under the present para., is to refuse to file the award, even where the portion of the award open to exemption can be separated from the rest (m).

22. The last thirty-seven words of section 21 of the Specific Relief Act, 1877, shall not apply to any agreement to refer to arbitration, or to any award, to which the provisions of this Schedule apply.

Exclusion of certain words
in the Specific Relief Act,
1877.

Last thirty-seven words of sec. 21 of the Specific Relief Act.—Those words are—"but if any person who has made such a contract [that is, a contract to refer to arbitration] and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit." These words have been omitted in view of the provisions of para. 18 above.

23. The forms set forth in the Appendix, with such variations as the circumstances of each case require, shall be used for the respective purposes, therein mentioned.

Forms.

(m) *Mustafa Khan v. Phulja Bibi* (1905) 27 All. 526; *Dandekar v. Dandekar* (1882) 6 Bom. 663; *Thiruvengada Thiengar v.*

Vaidinatha (1906) 20 Mad. 303; *Danabandhu v. Chintamani* (1914) 19 C. W. N. 476.

APPENDIX TO THE SECOND SCHEDULE.

No. 1.

APPLICATION FOR AN ORDER OF REFERENCE.

(*Title of suit*).

1. This suit is instituted for (*state nature of claim*).
2. The matter in difference between the parties is (*state matter of difference*).
3. The applicants being all the parties interested have agreed that the matter in difference between them shall be referred to arbitration.
4. The applicants therefore apply for an order of reference.

A. B.

C. D.

Dated the day of 19

NOTE.—If the parties are agreed as to the arbitrators it should be so stated.

No. 2.

(ORDER OF REFERENCE.

(*Title of suit*).

Upon reading the application presented on the day of
19 , it is ordered that the following matter in difference arising in this suit,
namely : _____

be referred for determination to X and Y, or in case of their not agreeing then to the
determination of Z, who is hereby appointed to be umpire; and such arbitrators are to
make their award in writing on or before the

day of 19 , and in case of the said arbitrators not agreeing
in an award the said umpire is to make his award in writing within

months after the time during which it is within the power of the arbitrators to
make an award shall have ceased.

Liberty to apply.

Given under my hand and the seal of the Court, this
19

day of

Judge.

No. 3.

ORDER FOR APPOINTMENT OF NEW ARBITRATOR.

(*Title of suit*).

Whereas by an order, dated the day of 19 [*state
order of reference and death, refusal, etc., of arbitrator*], it is by consent ordered that Z
be appointed in the place of X deceased (or as the case may be) to act as arbitrator with
Y, the surviving arbitrator, under the said order; and it is ordered that the award of
the said arbitrators be made on or before the

day of 19 .

Given under my hand and the seal of the Court, this day of
19 .

Judge.

THE SECOND SCHEDULE.

Arbitration.

Sch. II,
App.

No. 4.

SPECIAL CASE.

(Title of suit).

In the matter of an arbitration between *A B* of _____ and *C D*
of _____ the following special case is stated for the opinion of
the Court :—

[Here state the facts concisely in numbered paragraphs.]

The questions of law for the opinion of the Court are :—

First, whether _____

Secondly, whether _____

X.

Y.

Dated the _____ day of _____ 19 ____

No. 5.

AWARD.

(Title of suit).

In the matter of an arbitration between *A B* of _____ and,
C D of _____ :—

WHEREAS in pursuance of an order of reference made by the Court of
and dated the _____ day of _____
the following matter in difference between *A B* and *C D* namely.

has been referred to us for determination :

Now we, having duly considered the matter referred to us, do hereby make our
award as follows :—

We award—

(1) that _____

(2) that _____

Dated the _____ day of _____ 19 ____

X.

Y.

THE THIRD SCHEDULE.

EXECUTION OF DECREES BY COLLECTORS.

1. Where the execution of a decree has been transferred
to the Collector to the Collector under section 68, he may—

- (a) proceed as the Court would proceed when the sale of immoveable property is postponed in order to enable the judgment-debtor to raise the amount of the decree ; or
- (b) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium or by mortgaging the whole or any part of the property ordered to be sold ; or
- (c) sell the property ordered to be sold or so much thereof as may be necessary.

2. Where the execution of a decree, not being a decree ordering the sale of immoveable property
Procedure of collector in special cases in pursuance of a contract specifically affecting the same, but being a decree for the payment of money in satisfaction of which the Court has ordered the sale of immoveable property, has been so transferred, the Collector, if, after such inquiry as he thinks necessary, he has reason to believe that all the liabilities of the judgment-debtor can be discharged without a sale of the whole of his available immoveable property, may proceed as hereinafter provided.

3. (1) In any such case as is referred to in paragraph 2, the Collector shall publish a notice, allowing a period of sixty days from the date of its publication for compliance and calling upon—
Notice to be given to decree-holders and to persons having claims on property.

- (a) every person holding a decree for the payment of money against the judgment-debtor capable of execution by sale of his immoveable property and which such decree-holder desires to have so executed, and every holder of a decree for the payment of money in execution of which proceedings for the

Execution by Collectors.

Sch. III,
paras.3,4.

sale of such property are pending, to produce before the Collector a copy of the decree, and a certificate from the Court which passed or is executing the same, declaring the amount recoverable thereunder ;

- (b) every person having any claim on the said property to submit to the Collector a statement of such claim, and to produce the documents (if any) by which it is evidenced.

(2) Such notice shall be published by being affixed on a conspicuous part of the Court-house of the Court which made the original order for sale, and in such other places (if any) as the Collector thinks fit ; and where the address of any such decree-holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise.

Power of Collector to hear objections to execution of decree transferred to him for execution.—Where a decree for money is transferred for execution to the Collector under s. 68, he is not authorized under this paragraph to hear any objection by the parties interested in the property advertised for sale to the sale of that property, nor is it any part of the Collector's duty to decide whether the property has or has not been properly attached (n).

4. (1) Upon the expiration of the said period, the Collector shall appoint a day for hearing any representations which the judgment-debtor and the decree-holders or claimants (if any) may desire to make and for holding such inquiry as he may deem necessary for informing himself as to the nature and extent of such decrees and claims and of the judgment debtor's immoveable property, and may, from time to time, adjourn such hearing and inquiry.

Amount or decrees for payment of money to be ascertained, and immoveable property available for their satisfaction.

(2) Where there is no dispute as to the fact or extent of the liability of the judgment-debtor to any of the decrees or claims of which the Collector is informed, or as to the relative priorities of such decrees or claims, or as to the liability of any such property for the satisfaction of such decrees or claims, the Collector shall draw up a statement, specifying the amount to be recovered for the discharge of such decrees, the order in

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which such decrees and claims are to be satisfied, and the immoveable property available for that purpose. Sch. III,
paras.
4-7.

(3) Where any such dispute arises, the Collector shall refer the same, with a statement thereof and his own opinion thereon, to the Court which made the original order for sale, and shall, pending the reference, stay proceedings relating to the subject thereof. The Court shall dispose of the dispute if the matter thereof is within its jurisdiction, or transmit the case to a competent Court for disposal, and the final decision shall be communicated to the Collector, who shall then draw up a statement as above provided in accordance with such decision.

5. The Collector may, instead of himself issuing the notices and holding the inquiry required by paragraphs 3 and 4, draw up a statement specifying the circumstances of the judgment-debtor and of his immoveable property so far as they are known to the Collector or appear in the records of his office, and forward such statement to the District Court and such Court shall thereupon issue the notices, hold the inquiry and draw up the statement required by paragraphs 3 and 4 and transmit such statement to the Collector.

Where District Court may
issue notices and hold
inquiry

6. The decision by the Court of any dispute arising under paragraph 4 or paragraph 5 shall, as between the parties thereto, have the force of and be appealable as a decree.

Effect of decision of Court
is to dispute

7. (1) Where the amount to be recovered and the property available have been determined as provided in paragraph 4 or paragraph 5, the Collector may,—

Scheme for liquidation of
decrees for payment of
money.

- (a) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed to sell such property; or,
- (b) if it appears that the amount with interest (if any) in accordance with the decree, and, when not decreed, with interest (if any) at such rate as he

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Sch. III,
para. 7.

thinks reasonable, may be recovered without such sale, raise such amount and interest (notwithstanding the original order for sale)—

- (i) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said property or
- (ii) by mortgaging the whole or any part of such property ; or
- (iii) by selling part of such property ; or
- (iv) by letting on farm, or managing by himself or another, the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale : or
- (v) partly by one of such modes and partly by another or others of such modes.

(2) For the purpose of managing the whole or any part of such property, the Collector may exercise all the powers of its owner.

(3) For the purpose of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing, or for preserving the property from sale in satisfaction of an incumbrance, the Collector may discharge the claim of any incumbrance which has become payable or compound the claim of any incumbrancer whether it has become payable or not, and, for the purpose of providing funds to effect such discharge or composition, may mortgage, let or sell any portion of the property which he deems sufficient. If any dispute arises as to the amount due on any incumbrance with which the Collector proposes to deal under this clause, he may institute a suit in the proper Court, either in his own name or the name of the judgment-debtor, to have an account taken, or he may agree to refer such dispute to the decision of two arbitrators, one to be chosen by each party, or of an umpire to be named by such arbitrators.

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(4) In proceeding under this paragraph, the Collector shall be subject to such rules consistent with this Act as may, from time to time, be made in this behalf by the Local Government.

**Sch. III,
paras.
7-9.**

8. Where, on the expiration of the letting or management under paragraph 7, the amount to be recovered has not been realized, the Collector shall notify the fact in writing to the judgment-debtor or his representative in interest, stating at the same time that, if the balance necessary to make up the said amount is not paid to the Collector within six weeks from the date of such notice, he will proceed to sell the whole or a sufficient part of the said property; and if on the expiration of the said six weeks the said balance is not so paid, the Collector shall sell such property or part accordingly.

Recovery of balance (if any) after letting or management

9. (1) The Collector shall, from time to time, render to the Court which made the original order for sale an account of all monies which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this schedule, and shall hold the balance at the disposal of the Court.

Collector to render account to Court

(2) Such charges shall include all debts and liabilities from time to time due to the Government in respect of the property or any part thereof, the rent (if any) from time to time due to a superior holder in respect of such property or part, and, if the Collector so directs, the expenses of any witnesses summoned by him.

(3) The balance shall be applied by the Court—

(a) in providing for the maintenance of such members of the judgment-debtor's family (if any) as are entitled to be maintained out of the income of the property, to such amount in the case of each member as the Court thinks fit; and

Execution by Collectors.

Sch. III,
paras.
9, 10.

- (b) Where the Collector has proceeded under paragraph 1, in satisfaction of the original decree in execution of which the Court ordered the sale of immoveable property, or otherwise as the Court may under section 73 direct ; or
- (c) Where the Collector has proceeded under paragraph 2,—
 - (i) in keeping down the interest on incumbrances on the property ;
 - (ii) where the judgment-debtor has no other sufficient means of subsistence, in providing for his subsistence to such amount as the Court thinks fit : and
 - (iii) in discharging rateably the claims of the original decree-holder and any other decree-holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered.
- (4) No other holder of a decree for the payment of money shall be entitled to be paid out of such property or balance until the decree-holders who have obtained such order have been satisfied, and the residue (if any) shall be paid to the judgment-debtor or such other person as the Court directs.
- ✓ 10. Where the Collector sells any property under this Schedule, he shall put it up to public auction in one or more lots, as he thinks fit, and may—

Sales how to be conducted

 - (a) fix a reasonable reserved price for each lot ;
 - (b) adjourn the sale for a reasonable time whenever, for reasons to be recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property ;
 - (c) buy in the property offered for sale, and re-sell the same by public auction or private contract, as he thinks fit.

Execution by Collectors.

11. (1) So long as the Collector can exercise or perform in respect of the judgment-debtor's immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money.

(2) During the same period no Civil Court shall issue any process of execution either against the judgment-debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7.

(3) The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree-holder has been temporarily deprived.

Mortgage by judgment-debtor. A mortgage by a judgment-debtor of his property, while it is under the management of the Collector to whom decrees against the judgment-debtor have been transferred for execution, is inoperative as against a lessee from the Collector exercising his powers under paragraph 7 of this Schedule (o). But the mortgage is *not void*, and it will therefore take effect in favour of the mortgagee immediately the proceedings in attachment before the Collector are closed by him (p).

"Alienate."—The word alienate in this paragraph contemplates a transfer which is to take effect immediately and not after death. It does not therefore include a disposition of property by will (q).

Alienation subsequent to certification of adjustment.—An intimation by a decree-holder to the Collector to whom the decree is transferred for execution that his claim under the decree has been satisfied by the judgment-debtor, and the recording of such intimation by the Collector amounts to a due certifying of the adjustment of a decree within the meaning of O. 21, r. 2. After the adjustment has been so certified, the prohibition against alienation imposed by this paragraph no longer subsists, and it is competent to the judgment-debtor to mortgage, sell or alienate his property (r).

(o) *Gana Prasad v. Ganga Baksh* (1907) 29 All. 415.

(p) *Magniram v. Bakubai* (1912) 36 Bom. 510.

(q) *Muhammad Sayeed v. Muhammad Ismail*

(1910) 33 All. 233.

(r) *Khushalchand v. Nandram* (1911) 36 Bom. 516.

Execution by Collectors.

Sch. III,
paras.
12, 13.

12. Where the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by paragraphs 1 to 10 shall be exercised and performed by such one of the Collectors of the said districts as the Local Government may by general rule or special order direct.

13. In exercising the powers conferred on him by paragraphs 1 to 10 the Collector shall have the powers of a Civil Court to compel the attendance of parties and witnesses and the production of documents.

Provision where property
is in several districts.

Powers of Collector to
compel attendance and pro-
duction.

THE FOURTH SCHEDULE.

(See section 155.)

ENACTMENTS AMENDED.

1	2	3	4
Year.	No.	Short title.	Amendment.
1870	VII	The Court-fees Act, 1870.	<p>In article 1 of Schedule I, after the word "plaint" the words "written statement pleading a set-off or counter-claim" and after the word "Act" the words "or of cross objection" shall be inserted.</p> <p>From article 11 of Schedule II, the words "from an order rejecting a plaint or" shall be omitted.</p> <p>For the entry in the first column of Schedule II relating to article 19 the following entry shall be substituted, namely :—</p> <p>"Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908."</p>

THE FIFTH SCHEDULE.

(ENACTMENTS REPEALED).

NOTE.—*This Schedule has been repealed by the Second Repealing and Amending Act 17 of 1914, Section 3.*

APPENDIX I.

Rules made by the High Court of Calcutta, under s. 122.

Schedule I—Appendix G—Form No. 9.—In the form of “Decree in Appeal,” No. 9 of Appendix G to the First Schedule. . . ., *cancel* the words from “Memorandum of Appeal” to “the following reasons, namely :—”(s).

APPENDIX II.

Rules made by the High Court of Bombay, under s. 122.

O. 3, r. 2, clause (a).—*O. 3, r. 2, cl. (a) be amended to read as follows :—*

“Persons holding general powers-of-attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, authorising them to make and do such appearances, applications and acts on behalf of such parties.”

O. 5, r. 22.—*The following proviso be added to O. 5, r. 22 :—*

“Provided that where any such summons is to be served within the limits of the town of Bombay, it may be addressed to the defendant at the place within such limits where he is residing and may be sent to him by the Court by post registered for acknowledgment. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary.”

O. 9, r. 5.—In r. 5 of O. 9, for the words “one year” the words “six months” shall be substituted.

Order 21.

O. 21, r. 44A.—*After r. 44 of O. 21, the following shall be inserted, namely :—*

“44A. Where the property to be attached is agricultural produce, a copy of the warrant or order of attachment shall be sent by post to the Office of the Collector of the District in which the land is situate.”

O. 21, r. 72A.—*After r. 72 of O. 21, the following shall be inserted, namely :—*

“72A. If leave to bid is granted to the mortgagee of immoveable property, a reserve price as regards him shall be fixed of not less than the amount then due for principal, interest and costs in case the property is sold in one lot, and not less in respect of each lot (in case the property is sold in lots) than such sum as shall appear to be properly attributable to it in relation to the amount aforesaid.”

O. 49, r. 4.—*The following be added as r. 4 in O. 49 :—*

“Under section 128, paragraph 2, clause (i), of the Civil Procedure Code of 1908, the following power is delegated to the Registrar of the High Court, Appellate Side, Bombay :

“Where on a memorandum of appeal presented within the time prescribed for the same, the whole or any part of the fee prescribed by the law for the time being in force relating to Court-fees has not been paid, the Registrar may in his discretion allow the

Rules—Bom.

- App. II. appellant to pay the whole or part as the case may be of such Court-fees and may admit the appeal to the register even though the subsequent payment of Court-fee may have been made after the time prescribed for presentation of the appeal."

Appendix B—Form No. 10.

Schedule I—Appendix B—Form No. 10.—*Form No. 10 in Appendix B, Schedule I be amended to read as follows :—*

"To accompany Returns of Summons of another Court (Order V, r. 23).

(Title.)

Read proceeding from the forwarding
for service on in Suit No. of 19 of that Court.

Read Serving Officer's endorsement stating that the and proof
of the above having been duly taken by me on the oath of and
it is ordered that the be returned to the with
this proceeding.

I hereby declare that the said summons on has been duly
served.

Judge.

NOTE.—This form will be applicable to process other than summons the service of which may have to be effected in the same manner."

APPENDIX III.

Rules made by the High Court of Allahabad, under s. 122.

Order V.

27. To O. V. r. 27, add the following as note 1 and note 2 :

1. A list of heads of offices to whom summonses shall be sent for service on the servants of Railway Companies working in whole or in part in these Provinces is given in Appendix (2) to the General Rules (Civil) of 1911.

2. In every case where a Court sees fit to issue a summons direct to any public servant other than a soldier under Order XVI. simultaneously with the issue of the summons notice shall be sent to the head of the office in which the person concerned is employed in order that arrangements may be made for the performance of the duties of such person.

Illustration : If the Court sees fit to issue a summons to a kanungo or patwari it shall inform the Collector of the district, and if to a sub-registrar it shall inform the District Registrar to whom the sub-registrar is subordinate."

31. An application for the issue of a summons for a party or a witness shall be made in the form prescribed for the purpose. No other forms shall be received by the Court.

Order XIII.

12. Every document not written in the Court vernacular or in English, which is produced (a) with a plaint or (b) at the first hearing or (c) at any other time tendered in evidence in any suit, appeal, or proceeding, shall be accompanied by a correct translation of the document into the Court vernacular. If any such document is written in the Court vernacular but in characters other than the ordinary Persian or Nagri characters in use, it shall be accompanied by a correct transliteration of its contents into the Persian or Nagri character.

13. When a document included in the list, prescribed by rule 1, has been admitted in evidence, the Court shall, in addition to making the endorsement prescribed in rule 4 (1) mark such document with serial figures in the case of documents admitted as evidence for a plaintiff, and with serial letters in the case of documents admitted as evidence for a defendant, and shall initial every such serial number or letter. When there are two or more parties defendants, the documents of the first party defendant may be marked A1, B1, C1, &c., AA1, BB1, &c. and those of the second A2, B2, C2, &c., AA2, BB2, &c. When a number of documents of the same nature is admitted, as for example a series of receipts for rent, the whole series shall bear one figure or capital letter or letters and a small figure or small letter shall be added to distinguish each paper of the series.

Rules—All.

App. III.

Order XVI.

22. (1) Save as provided in this rule and in rule 2, the Court shall allow travelling and other expenses on the following scale :—

- (a) In the case of witnesses of the class of cultivators, labourers, and menials, six annas a day ;
- (b) in the case of witnesses of a better class, such as zamindars, traders, pleaders, and persons of corresponding rank, from eight annas to two rupees a day, as the Court may direct ; and
- (c) in the case of witnesses of superior rank, including officers of Government in receipt of salary of not less than Rs. 200 a month, from three to five rupees a day.

(2) If a witness demand any sum in excess of what has been paid to him, such sum shall be allowed if he satisfies the Court that he has actually and necessarily incurred the additional expense.

Illustration.

A post office employee summoned to give evidence is entitled to demand from the party, on whose behalf or at whose instance he is summoned, the travelling and other expenses allowed to witnesses of the class or rank to which he belongs, and in addition the sum for which he is liable as payment to the substitute officiating during his absence from duty. The sum so payable in respect of the substitute will be certified by the official superior of the witness on a slip, which the witness will present to the Court from, which the summons was issued.

(3) If a witness be detained for a longer period than one day the expenses of his detention shall be allowed at such rate, not usually exceeding that payable under clause (1) of this rule, as may seem to the Court to be reasonable and proper.

Provided that the Court may, for reasons stated in writing, allow expenses on a higher scale than that hereinbefore prescribed.

Order XIX.

4. Affidavits shall be entitled in the Court of _____ at _____ (naming such Court). If the affidavit be in support of or in opposition to, an application respecting any case in the Court, it shall also be entitled in such case. If there be no such case it shall be entitled *In the matter of the petition of*

5. Affidavits shall be divided into paragraphs, and every paragraph shall be numbered consecutively and, as nearly as may be, shall be confined to a distinct portion of the subject.

6. Every person making any affidavit shall be described therein in such manner as shall serve to identify him clearly ; and where necessary for this purpose, it shall contain the full name, the name of his father, of his caste or religious persuasion, his rank or degree in life, his profession, calling, occupation or trade, and the true place of his residence.

Rules—All.

7. Unless it be otherwise provided, an affidavit may be made by any person having cognizance of the facts deposed to. Two or more persons may join in an affidavit; each shall depose separately to those facts which are within his own knowledge, and such facts shall be stated in separate paragraphs. **App. III.**

8. When the declarant in any affidavit speaks to any fact within his own knowledge he must do so directly and positively, using the words "I affirm" or "I make oath and say."

9. Except in interlocutory proceedings, affidavits shall strictly be confined to such facts as the declarant is able of his own knowledge to prove. In interlocutory proceedings, when the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant shall use the expression "I am informed," and, if such be the case, "and verily believe it to be true," and shall state the name and address of, and sufficiently described for the purposes of identification, the person or persons from whom he received such information. When the application or the opposition thereto rests on facts disclosed in documents or copies of document produced from any Court of Justice or other source, the declarant shall state what is the source from which they were produced, and his information and belief as to the truth of the facts disclosed in such documents.

10. When any place is referred to in an affidavit, it shall be correctly described. When in an affidavit any person is referred to, such person, the correct name and address of such person, and such further description as may be sufficient for the purpose of the identification of such person, shall be given in the affidavit.

11. Every person making an affidavit for use in a Civil Court, shall, if not personally known to the person before whom the affidavit is made, be identified to that person by some one known to him, and the person before whom the affidavit is made shall state at the foot of the affidavit the name, address, and description of him by whom the identification was made as well as the time and place of such identification.

12. No verification of a petition and no affidavit purporting to have been made by a *pardah-nashin* woman who has not appeared unveiled before the person before whom the verification or affidavit was made, shall be used unless she has been identified in manner already specified and unless such petition or affidavit be accompanied by an affidavit of identification of such woman made at the time by the person who identified her.

13. The person before whom any affidavit is about to be made shall, before the same is made, ask the person proposing to make such affidavit if he has read the affidavit and understands the contents thereof, and if the person proposing to make such affidavit state that he has not read the affidavit or appears not to understand the contents thereof, or appears to be illiterate, the person before whom the affidavit is about to be made shall read and explain, or cause some other competent person to read and explain in his presence, the affidavit to the person proposing to make the same, and when the person before whom the affidavit is about to be made is thus satisfied that the person proposing to make such affidavit understands the contents thereof, the affidavit may be made.

14. The person before whom an affidavit is made, shall certify at the foot of the affidavit the fact of the making of the affidavit before him and the time and place when

Rules—All.

App III and where it was made and shall for the purpose of identification mark and initial any exhibits referred to in the affidavit

15 If it be found necessary to correct any clerical error in any affidavit such correction may be made in the presence of the person before whom the affidavit is about to be made, and before but not after, the affidavit is made. Every correction so made shall be initialed by the person before whom the affidavit is made and shall be made in such manner as not to render it impossible or difficult to read the original word or words, figure or figures in respect of which the correction may have been made.

Order XX.

21. (1) Every decree or order is defined in section 2 other than a decree or order of a Court of Small Causes or of a Court in the exercise of the jurisdiction of a Court of Small Causes shall be drawn up in the Court vernacular. As soon as such decree or order has been drawn up and before it is signed the Munsam shall cause a notice to be posted on the notice board stating that the decree or order has been drawn up and that any party or the pleader of any party may, within six working days from the date of such notice, peruse the draft decree or order and may sign it or may file with the Munsam in objection to it on the ground that there is in the judgment a verbal error or some accidental defect not affecting a material part of the case or that such decree or order is at variance with the judgment or contains some clerical or arithmetical error. Such objection shall state clearly what is the error, defect or variance alleged and shall be signed and dated by the person making it.

(2) If any such objection be filed on or before the date specified in the notice the Munsam shall enter the case in the earliest weekly list practicable and shall on the date fixed put up the objection together with the record before the Judge who pronounced the judgment, or if such Judge has ceased to be the Judge of the Court before the Judge then presiding.

(3) If no objection has been filed on or before the date specified in the notice or if an objection has been filed and disallowed the Munsam shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(4) If an objection has been duly filed and has been allowed the correction or alteration directed by the Judge shall be made. Every such correction or alteration in the judgment shall be made by the Judge in his own handwriting. A decree amended in accordance with the direction or alteration directed by the Judge shall be drawn up and the Munsam shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(5) When the Judge signs the decree he shall make an autograph note stating the date on which the decree was signed.

Order XXI.

104. When the certificate prescribed by section 41 is received by the Court which is to execute the decree for execution, it shall cause the necessary details as to the result of execution to be entered in its register of civil suits before the papers are transmitted to the record room.

Rules—All.

105. Every attachment of moveable property under rule 43, of Negotiable Instruments under rule 51, and of immoveable property under rule 54, shall be made through a Civil Court Amin, or bailiff, unless special reasons render it necessary that any other agency should be employed; in which case those reasons shall be stated in the handwriting of the presiding Judge himself in the order for attachment. **App. III.**

106. When the property which it is sought to bring to sale is immoveable property within the definition of the same contained in the law for the time being in force relating to the registration of documents, and the decree is not sent to the Collector for execution under section 68, the Court, before ordering a sale, shall call upon the Sub-Registrar within whose sub-district such property is situate to search his registers and report as to what incumbrances, if any, it appears from the registers to be liable.

107. Where an application is made for the sale of land or of any interest in land, the Court shall, before ordering sale thereof, call upon the parties to state whether such land is or is not ancestral land within the meaning of Notification No. 1887/1—238-10, dated 7th October 1911, of the Local Government, and shall fix a date for determining the said question.

On the day so fixed, or on any date to which the enquiry may have been adjourned, the Court may take such evidence, by affidavit or otherwise, as it may deem necessary; and may also call for a report from the Collector of the district as to whether such land or any portion thereof is ancestral land.

After considering the evidence and the report, if any, the Court shall determine whether such land, or any, and what part of it, is ancestral land.

The result of the enquiry shall be noted in an order made for the purpose by the presiding Judge in his own handwriting.

108. When the property which it is sought to bring to sale is revenue paying or revenue free land or any interest in such land, and the decree is not sent to the Collector for execution under section 68, the Court, before ordering a sale, shall also call upon the Collector in whose district such property is situate to report whether the property is subject to any (and, if so, to what) outstanding claims on the part of Government.

109. The reports of the Sub-Registrar and Collector shall be open to the inspection of the parties or their pleaders, free of charge, between the time of the receipt by the Court and the declaration of the result of the enquiry.

No fees are payable in respect of search and report by the Sub-Registrar and Collector.

110. The result of the enquiry under rule 66 shall be noted in an order made for the purpose by the presiding Judge in his own handwriting. The Court may in its discretion adjourn the inquiry, provided that the reasons for the adjournment are stated in writing, and that no more adjournments are made than are necessary for the purposes of the inquiry.

111. If after proclamation of the intended sale has been made any matter is brought to the notice of the Court which it considers material for purchasers to know, the Court shall cause the same to be notified to intending purchasers when the property is put up for sale.

Rules—AII.

App. III. **112.** The costs of the proceedings under rules 66, 106 and 108 shall be paid in the first instance by the decree holder, but they shall be charged as part of the costs of the execution, unless the Court, for reasons to be specified in writing, shall consider that they shall either wholly or in part be omitted therefrom.

113. When permission has been given to a decree holder to bid for property the Court ordering the sale shall inform the officer appointed to conduct the sale whether there are any persons, in addition to the decree holder, entitled to share in the sale proceeds.

114. Whenever any Civil Court has sold, in execution of a decree or other order, any house or other building situated within the limits of a Military Cantonment or station, it shall, as soon as the sale has been consummated, forward to the Commanding Officer of such cantonment or station for his information and for record in the Bug de or other proper office, a written notice that such sale has taken place, and such notice shall contain full particulars of the property sold and of the name and address of the purchaser.

115. Whenever guns or other arms in respect of which licences have to be taken by purchasers under the Indian Arms Act (Act No. XI of 1875) are sold by public auction in execution of decrees by order of a Civil Court the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act.

116. When an application is made for the attachment of live stock or other moveable property, the decree holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for fifteen days. If within three clear days before the expiry of any such period of fifteen days the amount of such costs for such further period as the Court may direct be not paid into Court, the Court, on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

117. Live stock which has been attached in execution of a decree shall ordinarily be left at the place where the attachment is made either in custody of the judgment debtor on his furnishing security, or in that of some landholder or other respectable person willing to undertake the responsibility of its custody and to produce it when required by the Court.

118. If the Custody of live stock cannot be provided for in the manner described in the last preceding rule, the animals attached shall be removed to the nearest pound established under the Cattle Trespass Act, 1871, and committed to the custody of the pound keeper, who shall enter in a register—

- (a) the number and description of the animals,
- (b) the day and hour on and at which they were committed to his custody,
- (c) the name of the attaching officer or his subordinate by whom they were committed to his custody, and shall give such attaching officer or subordinate a copy of the entry.

Rules—All.

119. For every animal committed to the custody of the pound-keeper as aforesaid, a charge shall be levied as rent for the use of the pound for each fifteen or part of fifteen days during which such custody continues, according to the scale prescribed under section 12 of Act No. 1 of 1871. **App. III.**

And the sums so levied shall be sent to the Treasury for credit to the Municipal or District Board, as the case may be, under whose jurisdiction the pound is. All such sums shall be applied in the same manner as fines levied under section 12 of the said Cattle Trespass Act.

120. The pound-keeper shall take charge of, feed and water, animals attached and committed as aforesaid until they are withdrawn from his custody as hereinafter provided and he shall be entitled to be paid for their maintenance at such rates as may be, from time to time, prescribed under proper authority. Such rates shall, for animals specified in the section mentioned in the last preceding rule, not exceed the rates for the time being fixed under section 3 of the same Act. In any case, for special reasons to be recorded in writing, the Court may require payment to be made for maintenance at higher rates than those prescribed.

121. The charges herein authorized for the maintenance of live-stock shall be paid to the pound-keeper by the attaching officer for the first fifteen days at the time the animals are committed to his custody, and thereafter for such further period as the Court may direct, at the commencement of such period. Payments for such maintenance so made in excess of the sum due for the number of days during which the animals may be in the custody of the pound-keeper shall be refunded by him to the attaching officer.

122. Animals attached and committed as aforesaid shall not be released from custody by the pound-keeper except on the written order of the Court, or of the attaching officer, or of the officer appointed to conduct the sale; the person receiving the animals, on their being so released, shall sign a receipt for them in the register mentioned in rule 118.

123. For the safe custody of moveable property other than live-stock while under attachment, the attaching officer shall, subject to approval by the Court, make such arrangements as may be most convenient and economical.

124. With the permission of the Court the attaching officer may place one or more persons in special charge of such property.

125. The fee for the services of each such person shall be payable in the manner prescribed in rule 116. It shall not be less than two annas, and shall ordinarily not be more than three and a half annas per diem. The Court may at its discretion allow a higher fee; but if it do so, it shall state in writing its reasons for allowing an exceptional rate.

126. When the services of such person are no longer required the attaching officer shall give him a certificate on a counterfoil form of the number of days he has served and of the amount due to him; and on the presentation of such certificate to the Court which ordered the attachment, the amount shall be paid to him in the presence of the presiding Judge. Provided that, where the amount does not exceed Rs. 5, it may be paid to the Sahna by money order on requisition by the Amin, and the presentation of the certificate may be dispensed with.

127. When in consequence of an order of attachment being withdrawn or for some other reason, the person has not been employed or has remained in charge of the property for a shorter time than that for which payment has been made in respect of his services, the fee paid shall be refunded in whole or in part, as the case may be.

Rules—All.

App. III. 128. Fees paid into Court under the foregoing rules shall be entered in the Register of Petty Receipts and Repayments.

129. When any sum levied under rule 119 is remitted to the treasury, it shall be accompanied by an order in triplicate (in the form given as form 9 of the Municipal Account Code), of which one part will be forwarded by the Treasury Officials to the District or Municipal Board, as the case may be. A note that the same has been paid into the Treasury as rent for the use of the pound, will be recorded on the extract from the pass book.

130. The cost of repairing attached property for sale, or of conveying it to the place where it is to be kept or sold, shall be payable by the decree-holder to the attaching officer. In the event of the decree holder failing to provide the necessary funds, the attaching officer shall report his default to the Court, and the Court may thereupon issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

Order XXVII.

9. In every case in which the Government Pleader appears for the Government as a party on its own account, or for the Government as undertaking under the provisions of rule 9 (1), the defence of a suit against an officer of the Government, he shall in lieu of a vakalatnama file a memorandum on unstamped paper signed by him and stating on whose behalf he appears. Such memorandum shall be as nearly as may be in the terms of the following form

TITLE OF THE SUIT, &c

I, A B, Government Pleader, appear on behalf of the Secretary of State for India in Council (or the Government of the United Provinces, or as the case may be) Respondent (or &c), in the suit

or, on behalf of the Government [which, under Order 27, rule 8 (1) of Act No 1 of 1908, has undertaken the defence of the suit], respondent (or &c), in the suit

Order XXXII

4 (3). In 4 (3) substitute a comma for the full stop and add the following words
“unless a notice under rule 3 (4) of this order has been duly served on him and he has failed to reply to that notice within the time specified therein”

Order XLI.

Revised rule 3 (1)

3 (1). Where the memorandum of appeal is not drawn up in the manner herein before prescribed, or accompanied by the copies mentioned in rule 1 (1) It may be rejected, or where the memorandum of appeal is not drawn up in the manner prescribed, it may be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there

Rejection or amendment of memorandum

Order XLII.

Revised rule 1

“Appeals from Appellate Decrees

1. The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees, subject to the following provision.—

“Every memorandum of appeal from an appellate decree shall be accompanied by a copy of the decree appealed from and (unless the Court dispenses therewith) of the judgment on which it is founded, and also of the judgment of the court of first instance”

Order XLIII.

App. III.

3. In every appeal under rule 1, in every miscellaneous case, and in every suit dismissed for default, a formal order shall be drawn up stating clearly the determination of the appeal or case, the costs incurred, and the parties, if any, by whom such costs are to be paid.

FORMS.

APPENDIX B.

No. 20.

APPLICATION FOR ISSUE OF SUMMONS TO A PARTY OR WITNESS.

No. of suit.

Name of parties

In the Court of the

Date fixed for hearing

1	2	3	4		5		6
Number of witnesses to be summoned.	Name and full address of each person to be summoned.	Rank or occupation.	Distance of residence from Court.		Cash paid for		Name and address of person to whom unexpended travelling expenses and diet money should be returned.
			Rail.	Road.	Travelling expenses.	Diet expenses.	

APPENDIX E.

No. 43.

The security to be furnished under section 55 (4) shall be, as nearly as may be, by a bond in the following form :—

In the Court of _____ at _____

Suit No. _____

of 19 _____

against _____

Plaintiff.

Defendant

C. D. of _____

WHEREAS in execution of the decree in the suit aforesaid, the said C. D. has been arrested under a warrant and brought before the Court of _____

; and whereas the said C. D. has applied for his discharge on the ground _____

Rules—All.

App. III. that he undertakes within one month to apply under section 5 of Act No. III of 1907, to be declared an insolvent, and the said Court has ordered that the said C. D. shall be released from custody if the said C. D. furnish good and sufficient security in the sum of Rs. _____ that he will appear when called upon, and that he will within one month from this date apply under section 5 of Act No. III of 1907, to be declared an insolvent; Therefore I, E. F., inhabitant of _____ have voluntarily become security, and do hereby bind myself, my heirs and executors, to _____ as Judge of the said Court and his successors in office that the said C. D., will appear at any time when called upon by the said Court, and will apply in the manner and within the time hereinbefore set forth, and in default of such appearance or of such application, I bind myself, my heirs and executors, to pay to the said Court, on its order, the sum of Rs. _____

Witness my hand at _____ this _____ day of _____ 19 _____

(Sd.) E. F.,

Witnesses :

Surety.

APPENDIX F.

No. 11.

The security to be furnished under Order XXXVIII, rule 9, shall be, as nearly as may be, by a bond in the following form :—

In the Court of _____ at _____
Suit No. _____ of 19 _____

.. Plaintiff.

.. Defendant.

Amount of suit, Rupees _____

WHEREAS in the suit above specified the plaintiff _____ aforesaid, has applied to the said Court that the said defendant, _____, may be called on to furnish sufficient security to fulfil any decree that may be passed against him in the said suit, or that on his failure so to do, certain property of the said defendant, _____, may be attached :

And whereas, on the failure of the said defendant, _____, to furnish such security, or, show cause why it should not be furnished, the property aforesaid of the said defendant, _____ has been attached by order of the said Court :

Therefore I _____, inhabitant of _____, have voluntarily become security and hereby bind myself, my heirs and executors, to _____ as Judge of the said Court, and his successors in Office, that the said defendant, _____ shall produce and place at the disposal of the said Court, when required, the property hereinbelow specified, namely, (*here give description of property or refer to an annexed schedule*), or the value of the same, or such portion thereof as may be sufficient to fulfil such decree and shall when required pay the costs of the attachment, and in default of his so doing I bind myself, my heirs and executors, to pay to _____ as Judge of the said Court and his successors in office on its order such sum to the extent _____

Rules—All.

o rupees (*here enter a sufficient sum to cover the amount of suit with costs and the costs of the attachment*) as the said Court may adjudge against the said defendant. **App. III.**

Witness my hand at this day of
19 (Signed)
Surety.
Witnesses : (Signed)

No. 12.

The security to be furnished under Order XXXIX, rule 2 (2), shall be, so far as may be, by a bond in the following form :—

In the Court of at
Suit No. of 19
.. Plaintiff.
.. Defendant.

WHEREAS, in the suit above specified, instituted by the said plaintiff, to restrain the said defendant, from (*here state the breach of contract or other injury*), the said Court has, on the application of the said plaintiff, granted an injunction to restrain the said defendant from the repetition (*or the continuance*) of the said breach of contract (*or wrongful act complained of*), and required security from the said defendant against such repetition (*or continuance*):

Therefore I, , inhabitant of , have voluntarily become security and do hereby bind myself, my heirs and executors to as judge of the said Court and his successors in office that the said defendant shall abstain from the repetition (*or continuance*) of the breach of contract aforesaid (*or wrongful act, or from the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right*), and in default of his so abstaining, I bind myself, my heirs and executors to pay into Court, on the order of the Court such sum to the extent of rupees , as the Court shall adjudge against the said defendant.

Witness my hand at this day of
19
Witnesses : Surety.

APPENDIX H.

No. 4.

Notice to show cause. (General Form.)

IN THE COURT OF

AT DISTRICT.

CIVIL SUIT No. OF 19
Miscellaneous No. of 19

versus

resident of
resident of

Rules—All.

App. III. To

WHEREAS the abovenamed
has made application to this Court that
you are hereby warned to appear in this Court in person or by a pleader duly instructed
on the day of 19 , at o'clock in the forenoon,
to show cause against the application, failing wherein, the said application will be heard
and determined *ex parte*, and it will be presumed that you consent to be appointed guar-
dian for the suit.

Given under my hand and the seal of the Court this day of

Judge.

APPENDIX H.

No. 5.

(List of documents produced by plaintiff
defendant Order 13. rule 1).

IN THE COURT OF AT DISTRICT.

Suit no. of 19 .

.. Plaintiff.

versus

.. Defendant.

List of documents produced with the plaint (or at first hearing) on behalf of plaintiff
(or defendant).

This list was filed by this day of 19 .

1	2	3			4
Serial number.	Description and date, if any, of the document.	What became of the document.			Remarks.
		If brought on the record the exhibit mark put on the document.	If rejected, date of return to party, and signature of party or pleader to whom the document was returned.	If it remains on the record after decision of the case and is enclosed in an envelope, under rule 24, Chapter III, the date of enclosure in the envelope.	

Signature of party or pleader producing the list.

Rules—All.

App. III.

APPENDIX H.

No. 11.

Notice to minor defendant and guardian.

IN THE COURT OF AT DISTRICT.
SUIT No. OF 19 .

resident of
plaintiff

versus

resident of
defendant.

To

Minor defendant.
Natural guardian.

WHEREAS an application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant, you, the said minor, and you (1) , are hereby required to take notice that unless within _____ days from the service upon you of this notice, an application is made to this Court for the appointment of you (1) or of some friend of you, the minor, to act as guardian for the suit, the Court will proceed to appoint you or some other person to act as guardian to the minor for the purposes of the said suit.

Given under my hand and the seal of the Court- this day of
19

Judge.

APPENDIX H.

No. 16.

The security to be furnished under Order XXV, rule 1, shall be as nearly as may be, by bond in the following form :—

In the Court of _____ at _____
Suit No. _____ of 19 _____

.. Plaintiff.

.. Defendant.

WHEREAS a suit has been instituted in the said Court by the said plaintiff
to recover from the said defendant the
sum of rupees and the said plaintiff is residing
out of British India (or is a woman) and does not possess any sufficient immovable
property within British India independent of the property in the suit :

Therefore, I, inhabitant of _____, have voluntarily become security, and do hereby bind myself, my heirs and executors, to as Judge of the said Court and to his successors in office that the said plaintiff _____, his heirs and executors, shall, whenever called on by the said Court, pay all costs that may have been or may be incurred by the said defendant, _____, in the said suit, and in default of such payment I bind myself, my heirs and executors, to pay all such costs to the said Court on its order.

Witness my hand at this day of 19 .

(Signed)

Witnesses

Surety.

APPENDIX IV.

Rules made by the High Court of Madras under s. 122.

O. 3, r. 4.—*Add the following as sub-rule (4) to O. 3, r. 4 :—*

“(4) Notwithstanding the termination of all proceedings in the suit so far as regards the client, the appointment of a pleader shall, unless otherwise provided therein or determined by the death of the client or the pleader or by revocation in accordance with the provisions of clause (2) of this rule, be deemed to authorise him to appear or to make any application or to do any act in connection with getting copies of documents and obtaining return of documents produced or filed in the suit or refund of money paid into Court in the suit.”

O. 4, r. 2.—*In O. 4, r. 2, number the present rule 2 (1), and add as rule 2 (2)—*

“Registers in accordance with Forms Nos. 14, 15, 16, 17 and 18 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of suits and cases specified therein.”

[NOTE.—For the new Forms Nos. 14, 15, 16, 17 and 18, see below Appendix II.]

O. 5, rr. 25, 26.—*Substitute the following for rr. 25 and 26 in O. 5 :—*

25. Where the defendant resides out of British India and has no Agent in British India empowered to accept service, the summons may be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate.

Service where defendant resides out of British India and has no Agent.

Provided that, if, by any arrangement between the Local Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides, the summons can be served by an officer of the Government of such territory, the summons may be sent to such officer in such manner as by the said arrangement may have been agreed upon.

26. Where—

(a) in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor-General in Council, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

Service in foreign territory through Political Agent or Court or by special arrangement.

(b) the Governor-General in Council has, by notification in the *Gazette of India*, declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be valid service, or

Substituted by Act XVIII of 1914.

(c) by any arrangement between the Local Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides the summons can be served by an officer of the Government of such territory.

the summons may be sent to such Political Agent or Court, or in such manner as may have been agreed upon to the proper officer of the Government of the foreign territory by post or otherwise, for the purpose of being served upon the defendant; and, if the summons is returned with an endorsement signed by such Political Agent or by the Judge or other officer of the Court or by the officer of the Government of the foreign territory that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service.

O 5, rr. 27, 28, 29A.—*Make the following amendments and additions to O. 5:—*

- (1) *In rule 27 after the words "send it" insert the words "by registered post prepaid for acknowledgment."*
- (2) *In rule 28 after the words "shall send" insert the words "by registered post prepaid for acknowledgment."*
- (3) *Insert as rule 29A—*

"Notwithstanding anything contained in the foregoing rules, where the defendant is a public officer (not belonging to His Majesty's Military or Naval forces or His Majesty's Indian Marine Service) sued in his official capacity, service of summons shall be made by sending a copy of the summons to the defendant by registered post prepaid for acknowledgment together with the original summons, which the defendant shall sign and return to the Court which issued the summons."

O. 9, r. 13.—*Make the following amendments to O. 9, r. 13:—*

- (1) Re-number rule 13 as rule 13 (1).
- (2) Add the following as sub-rule (2) to rule 13:—
 "(2) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)."

O. 13, r. 7.—*Add the following proviso to rule 7 (2):—*

"Provided that no document shall be returned which by force of the decree has become wholly void or useless."

O. 20, r. 1.—*Make the following amendments to O. 20, r. 1:—*

- (1) Re-number rule 1 as sub-rule (1).
- (2) Add the following as sub-rule (2):—
 "(2) The judgment may be pronounced by dictation to a shorthand writer in open Court, where the presiding Judge has been specially empowered in that behalf by the High Court."

O. 20, r. 3.—*For O. 20, r. 3, substitute the following rule:—*

"The judgment shall bear the date on which it is pronounced and shall be signed by the Judge and, when once signed, shall not afterwards be altered or added to, save as

Rules—Mad.

App. IV. provided by section 152 or on review, provided also that, where the presiding judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the judge."

O. 20, r. 12.—*Add the following to O. 20, r. 12 :—*

"(3) Where an Appellate Court directs such an inquiry, it may direct the Court of first instance to make the inquiry; and in every case the Court of first instance shall on the application of the decree-holder, inquire and pass the final decree."

O. 21, r. 17.—*In O. 21, r. 17. add as r. 17 (5) :—*

"Registers in accordance with Forms Nos. 19, 20 and 21 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of cases specified therein."

[NOTE.—For the new Forms Nos. 19, 20 and 21, see below Appendix H.]

O. 21, r. 25 (2).—(1) *Amend O. 21, r. 25 (2), as follows :—*

Insert the words "or cause him to be examined by any other Court" after the words "examine him."

(2) *Add the following proviso to r. 25 (2) :—*

"Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with the requirements of this clause.

O. 21, r. 43.—*For O. 21, r. 43, substitute the following rules, viz.:—*

"43. (1) Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof,

provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once, and

provided also that, when the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in the Form No. 15-A of Appendix E to this schedule with one or more sufficient sureties for its production when called for, or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance.

Rules—Mad.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in rule 55 or rule 57 or rule 60 of this order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment. **App. IV.**

43-A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

(2) If attached property is not sold under the first proviso to rule 43 or retained in the village or place where it is attached under the second proviso to that rule, it shall be brought to the Court-house and delivered to the proper officer of the Court.

43-B. (1) Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is so retained shall provide for its maintenance, and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the Court-house.

Nothing in this rule shall prevent the judgment-debtor or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings."

[NOTE.—An additional Form, being Form No. 15-A, has been inserted in Appendix E.]

O. 22, r. 11-A.—In O. 22 after r. 11, add the following as r. 11-A:—

"11-A. The entry on the record of the name of the representative of a deceased appellant or respondent in a matter pending before the High Court in its appellate jurisdiction, except in cases under appeal to the King in Council, shall be deemed to be a quasi-judicial act within the meaning of section 128 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications presented out of time shall be posted before a Judge for disposal."

Order XXVI-A.

O. 26-A.—After O. 26, read the following O. 26-A:—

(1) The Court may in any suit issue a commission to such persons as it thinks fit to translate accounts and other documents which are not in the language of the Court.

(2) The report of the Commissioner shall be evidence in the suit and shall form part of the record.

(3) Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expense of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

O. 27, r. 5.—For O. 27, r. 5, substitute the following rule:—

"The Court in fixing the day for the Secretary of State for India in Council to answer the plaint shall allow not less than three months' time from the date of summons for

Rules—Mad.

App. IV. the necessary communication with the Government through the proper channel and for the issue of instructions to the Government Pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government and may extend the time at its discretion."

O. 29, r. 1-A.—*Insert as Rule 1-A of Order 29—*

"In suits against a Local Authority the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the date of summons and the date for appearance."

Order XXXII.

O. 32, r. 3.—*For O. 32, r. 3, substitute the following rule :—*

"3. (1) Where the defendant is a minor, the Court, on being satisfied of the act of his minority, shall appoint a proper person to be guardian for the suit for the minor.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) The application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed. The affidavit shall further state the name of the person or persons on whom notice has to be served under the provisions of sub-rule (5).

(4) An application for the appointment of a guardian for the suit of a minor shall not be combined with an application for bringing on record the legal representatives of a deceased plaintiff or defendant. The application shall be by separate petitions.

(5) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf or, where there is no guardian, upon notice to the father or other natural guardian of the minor or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule. The notice required by this sub-rule shall be served six clear days before the day named in the notice for the hearing of the application and may be in form No. 11 set forth in appendix H hereto."

O. 32, r. 4.—*For O. 32, r. 4, substitute the following rule :—*

4. (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit :

Provided that the interest of that person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than the guardian shall act as the next friend of the minor or be appointed as guardian for the suit unless the court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

Rules—Mad.

(3) No person shall without his consent be appointed guardian for the suit. When- **App. IV.**
 ever an application is made proposing the name of a person as guardian for the suit, a notice in form No. 11-A set forth in appendix H hereto shall be served on the proposed guardian, unless the applicant himself be the proposed guardian or the proposed guardian consents.

(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be the guardian, and may direct that the costs to be incurred by that officer in the performance of his duties as guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of the costs as justice and the circumstances of the case may require.

(5) When a guardian for the suit of a minor defendant is appointed, and it is made to appear to the Court that the guardian is not in possession of any, or sufficient funds for the conduct of the suit on behalf of the defendant, and that the defendant will be prejudiced in his defence thereby, the Court may, from time to time, order the plaintiff to advance moneys to the guardian for the purpose of his defence and all moneys so advanced shall form part of the costs of the plaintiff in the suit. The order shall direct that the guardian, as and when directed, shall file in Court an account of the moneys so received by him.

O. 32, r. 7.—*Add the following in O. 32, r. 7 :—*

Rule.—“(1-A). Where an application is made to the Court for leave to enter into an agreement or compromise or for withdrawal of a suit in pursuance of a compromise or for taking any other action on behalf of a minor or other person under disability and such minor or other person under disability is represented by counsel or pleader, the counsel or pleader shall file in Court with the application a certificate to the effect that the agreement or compromise or action proposed is in his opinion for the benefit of the minor or other person under disability. A decree or order for the compromise of a suit appeal or matter, to which a minor or other person under disability is a party, shall recite the sanction of the Court thereto and shall set out the terms of the compromise as in the following Form which shall be numbered as Form No. 24 in Appendix D to this Schedule.”

O. 32, r. 14-A.—*In O. 32 after r. 14, add the following as rule 14-A :—*

“14-A. The appointment or discharge of a next friend or guardian for the suit of a minor in a matter pending before the High Court in its appellate jurisdiction, except in cases under appeal to the King in Council, shall be deemed to be a quasi-judicial act within the meaning of section 128 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications presented out of time shall be posted before a judge for disposal.”

O. 32, r. 17.—*Add as rule 17 of Order 32—*

“In suits relating to the person or property of a minor or other person under the superintendence of the Court of Wards the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the date of summons and the date for appearance.”

Rules—Mad.

App. IV.

ORDER XLI.

O. 41, r. 1.—(1) *Add the following sentence to sub-r. (1) of r. 1 :—*

“The copy of the judgment shall be a printed copy in every case in which the High Court has prescribed that the judgment shall be printed when a copy is applied for for the purpose of appeal.”

(2) *Add the following sentence to sub-r. (2) of r. 1 :—*

“The memorandum shall also contain a statement of the valuation of the appeal for the purposes of the Court Fees Act.”

O. 41, r. 9.—*Substitute the following for r. 9 (2) :—*

“Registers in accordance with Forms Nos. 22, 23, 24 and 25 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of suits specified therein.”

[NOTE.—For the new Forms Nos. 22, 23, 24 and 25, see Appendix H below.]

O. 41, r. 18.—*In O. 41, r. 18, after the words “cost of serving the notice” insert the words “or if the notice is returned unserved, to deposit within any subsequent period fixed the sum required to defray the cost of any further attempt to serve the notice.”*

O. 41, r. 31.—*Substitute the following for r. 31 :—*

31. The judgment of the Appellate Court shall be in writing and shall state—

- (a) the points for determination ;
- (b) the decision thereon ;
- (c) the reasons for the decision ; and
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled ;

and shall bear the date on which it is pronounced and shall be signed by the Judge or the Judges concurring therein ; provided that, where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge.

ORDER XLI-A (new).

Appeals to the High Court from original decrees of Subordinate Courts.

1. The rules contained in Order XLI shall apply to appeals in the High Court of Judicature at Madras with the modifications contained in this order.

2. (1) The memorandum of appeal shall be accompanied by the prescribed fees for service of notice of appeal and the receipt of the accountant of the Court for the sum prescribed by the rules of Court.

(2) Unless otherwise ordered the period prescribed by the notice for entry of appearance by the respondent shall be twenty-five days from the service of notice upon him.

Rules—Mad.

3. (1) If the respondent intends to appear and defend the appeal he shall within the period specified in the notice of appeal enter an appearance by filing in Court a memorandum of appearance. **App. IV.**

(2) If a respondent fails to enter an appearance within the time and in the manner provided by the sub-rule above, he shall not be allowed to translate or print any part of the record.

Provided that a respondent may apply by petition for further time, and the Court may thereupon make such order as it thinks fit. The application shall be supported by evidence to be given on affidavit as to the reason for the applicant's default, and notice thereof shall be given to the appellant and all parties who have entered an appearance. Unless otherwise ordered the applicant shall pay the costs of all parties appearing upon the application.

4. (1) The memorandum of appeal and the memorandum of appearance shall state an address for service within the City of Madras at which service of any notice, order or process may be made on the party filing such memorandum.

(2) If a party appears in person, the address for service may be within the local limits of the jurisdiction of the Court from whose decree the appeal is preferred.

Provided that if such party subsequently appears by a pleader he shall state in the vakalat an address for service within the City of Madras, and shall give notice thereof to each party who has appeared.

(3) If a party appears by a pleader, his address for service shall be that of his pleader, and all notices to the party shall be served on his pleader at that address.

5. The Court may direct that service of a notice of appeal or other notice or process shall be made by sending the same in a registered cover prepaid for acknowledgment and addressed to the address for service of the party to be served which has been filed by him in the lower Court. Provided that, after a party has given notice of an address for service in accordance with Rule 4, service of any notice or process shall be made at such address.

6. All notices and process, other than a notice of appeal, shall be sufficiently served if left by a party or his pleader, or by a person employed by the pleader, or by an officer of the Court, between the hours of 11 a.m. and 5 p.m. at the address for service of the party to be served.

7. Notices which may be served by a party or his pleader under Rule 6, or which are sent from the office of the Registrar may, unless the Court otherwise directs, be sent by registered post; and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof and the posting thereof shall be a sufficient service.

8. If there are several respondents, and all do not appear by the same pleader, they shall give notice of appearance to such of the other respondents as appear separately.

9. A list of all cases in which notice is to be issued to the respondent shall be affixed to the Court notice board after the case has been registered.

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App. IV. **10.** (1) If upon a case being called on for hearing by the Court, it appears that the record has not been translated and printed in accordance with the rules of Court, the Court may hear the appeal or dismiss it, or may adjourn the hearing and direct the party in default to pay costs, or may make such order as it thinks fit.

(2) If the Court proceeds to hear the appeal, it may refuse to read or refer to any part of the record which is not included in the printed papers.

11 When costs are awarded, unless the Court otherwise orders, the costs of a party appearing upon any application before the Registrar or the Court shall be Rs. 15, and the costs of appearing when the appeal is in the daily cause list for final hearing and is adjourned shall be Rs. 30. At the request of any party, the Registrar shall cause the order to be drawn up and the said costs to be inserted therein.

Memorandum of Objections

12. (1) If the acknowledgment mentioned in Rule 22 (3) of Order XLI is not filed, the respondent shall together with the memorandum of objections file so many copies thereof as there are parties affected thereby.

(2) The prescribed fees for service shall be presented together with the memorandum to the Registrar.

13. If any party or the pleader of any party to whom a memorandum of objections has been tendered has refused or neglected for three days from the date of tender to give the acknowledgment mentioned in Rule 22 (3) of Order XLI, the respondent may file an affidavit stating the facts and the Registrar may dispense with service of the copies mentioned in Rule 12 (1).

14. Rule 31 of Order XLI shall not apply to the High Court. If judgment is given orally a shorthand note thereof shall be taken by an officer of the Court and a transcript made by him shall be signed or initialled by the Judge or by the Judges concurring therein after making such corrections as may be considered necessary.

ORDER XLI-B (new).

1. The rules of Order XLI-A shall apply, so far as may be, to appeals to the High Court of Madras under clause 15 of the Letters Patent of the said Court.

Provided that it shall not be necessary to file copies of the judgment and decree appealed from.

2. Notice of the appeal shall be given in manner prescribed by Order XLI-A. Rule 6, or if the party to be served has appeared in person, in manner prescribed by Rule 5 of the said order.

ORDER XLII (new).*Appeals from appellate decrees*

1. The rules of Order XLI and Order XLI-A shall apply, so far as may be, to appeals to the High Court of Judicature at Madras from appellate decrees with the modifications contained in this Order.

2. (1) The memorandum of appeal shall be printed or type-written and shall be accompanied by the following papers:—

A copy thereof; one certified copy and one plain printed or type-written copy of the decrees of Court of first instance and of the Appellate Court; four printed copies

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of each of the judgments of the said Courts, one copy of each judgment being a certified copy; and the receipt of the accountant of the Court for the sum prescribed by the rules of Court. **App. IV.**

(2) If any ground of appeal is based upon the construction of a document, a printed or type-written copy of such document shall be presented with the memorandum of appeal.

Provided that if such document is not in the English language and the appellant appears by a pleader, an English translation of the document certified by the pleader, to be a correct translation shall be presented.

(3) If the appellant fails to comply with this rule, the appeal may be dismissed.

ORDER XLIII.

O. 43, r. 2.—*Substitute the following for r. 2:—*

"2. The rules of Order XLI and of Order XLI-A shall apply, so far as may be, to appeals from the orders specified in Rule 1 and other orders of any civil Court from which an appeal to the High Court is allowed under any provision of law :

Provided that in the case of appeals against interlocutory orders made prior to decree, the Court which passed the order appealed from shall not send the records of the case unless an order has been made for stay of further proceedings in that Court."

O. 43, r. 3.—*Add the following as r. 3 of O. 43:—*

"3. A memorandum of appeal from an appellate order shall be accompanied by a printed or typed copy of the memorandum or application and of any papers filed therewith."

Appendix B to Schedule I.

Form No. 1.—*Insert the following note in red ink in Form No. 1, namely:—*

"Also take notice that in default of your filing an address for service before the day before mentioned you are liable to have your defence struck out."

Appendix D to Schedule I.

Form No. 10-A.—*Insert in Appendix D the following as Form No. 10-A:—*

FORM No. 10-A.

FINAL DECREE FOR SALE [ORDER 34, RULE 5 (2), OR ORDER 34, RULE 8 (4)].

(Title).

Upon reading the preliminary decree passed in the above suit and the application of the ^{plaintiff} dated _____ and upon hearing Mr. _____

for plaintiff and Mr. _____

for defendant and it appearing that the payment directed by the said decree has not been made.

It is heroby decreed as follows:—

(1) that the mortgaged property or a sufficient part thereof be sold and the proceeds of the sale (after defraying thereout the expenses of the sale) be applied in payment of what is declared due to ^{plaintiff} ~~defendant~~ in the aforesaid preliminary decree together

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App. IV. with subsequent interest and subsequent costs and that the balance, if any, be paid to the ~~defendant~~^{plaintiff} or other person entitled to receive it; (2) that if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full the ~~plaintiff~~^{defendant} be at liberty to apply for a personal decree for the amount of the balance; and (3) that the ~~defendant~~^{plaintiff} do also pay ~~plaintiff~~^{defendant} Rs. for the costs of this application.

[Here enter description of mortgaged property in English or in the language of the Court.]

NOTE.—(1) In the case of a decree under Order 34, rule 5 (2), score out the words plaintiff and defendant below the lines and in the case of a decree under Order 34, rule 8 (4), score out the same words occurring above the lines.

(2) Direction No. (2) should be struck out if the personal liability has not been adjudicated in the suit or has been declared not to exist.

Form No. 10-B.—Insert in Appendix D the following as Form No. 10-B:—

FORM No. 10-B.

FINAL DECREE FOR REDEMPTION [ORDER 34, RULE 3 (1), ORDER 34, RULE 5 (1)

AND ORDER 34, RULE 8 (1)].

(Title.)

Upon reading the preliminary decree in the above suit on _____ and
the application of the ~~defendant~~^{plaintiff} I.A. No. _____, dated _____
and after hearing Mr. _____ pleader for the
_____ and Mr. _____ pleader for the
_____ and it appearing that the payment directed by the
aforesaid decree has been made:—

It is hereby decreed as follows:—

That the ~~plaintiff~~^{defendant} do deliver up to the ~~defendant~~^{plaintiff} or to such person as he appoints all documents in his possession or power relating to the mortgaged property and do also retransfer the property to the ~~defendant~~^{plaintiff} free from the mortgage and from all incumbrances created by the ~~plaintiff~~^{defendant} or any person claiming under him (or by those under whom he claims) and do also put the ~~defendant~~^{plaintiff} in possession of the property.

SCHEDULE.

Description of the mortgaged property.

The costs of the ~~defendant~~^{plaintiff} in this proceeding:—

Particulars.

Amount

NOTE.—(1) In the case of a decree under Order 34, rule 8 (1), score out the words plaintiff and defendant above the lines; in the case of decree under Order 34, rule 3 (1) and rule 5 (1), score out the words plaintiff and defendant below the lines

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(2) The words "or by these under whom he claims" will be inserted only if the **App. IV.** mortgage derives title from an original mortgagee.

Form No. 24.—Add the following as Form No. 24 in Appendix D:—

FORM No. 24.

[DECREE SANCTIONING A COMPROMISE OF A SUIT ON BEHALF OF A MINOR OR LUNATIC.]

(Title.)

This suit coming on this day for final disposal in the presence of, etc., and C. D., the defendant, a minor by E.F., his guardian *ad litem*, applying that this suit may be compromised in the terms of an agreement in writing, dated the _____ day of _____ and made between A.B., the plaintiff of the one part, and the said C.D. by the said guardian *ad litem* of the other part, (or, on the terms hereafter set forth) and, it appearing to this Court that the said compromise is fit and proper and for the benefit of the said minor, this Court doth sanction the said compromise on behalf of the said minor, and with the consent of all parties hereto: It is ordered as follows:—

(Set out the terms of the compromise.)

Appendix E. to Schedule I.

Form No. 15.—For the word "Dated" substitute the words "Given under my hand and the seal of the Court, this _____ day of _____."

Form No. 15-A—Add the following as Form No. 15-A in Appendix E:—

FORM No. 15-A.

BOND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND LEFT
IN CHARGE OF PERSON INTERESTED AND SURETIES.

(Order XXI, rule 43.)

In the Court of _____ at _____

Civil Suit No. _____ of _____

A. B. of _____

against

C. D. of _____

Know all men by these presents that we, I.J. of _____ etc., and K.L. of _____ etc., and M.N. of _____ etc., are jointly and severally bound to the Judge of the Court of _____ in Rupees _____ to be paid to the said Judge, for which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this _____ day of _____ 191 _____

AND WHEREAS the moveable property specified in the schedule hereunto annexed has been attached under a warrant from the said Court, dated the _____ day of _____ 191 _____, in execution of a decree in favour of _____ in suit No. _____ of _____ 191 _____ on the file of _____ and the said property has been left in the charge of the said I.J.,

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App. IV. Now the condition of this obligation is that, if the above bounden I.J. shall duly account for and produce when required before the said Court all and every the property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void : otherwise it shall remain in full force.

I.J.
K.L.
M.N.

Signed and delivered by the above bounden _____ in the presence of _____.

Appendix F to Schedule I.

Form No. 9.—*For Form No. 9 of Appendix F, substitute—*

FORM No. 9.

APPOINTMENT OF A RECEIVER.

(O. XL, r. 1.)

(*Tillc.*)

WHEREAS it appears to the Court that in the above suit it is just and convenient to appoint a receiver of the properties specified below (or whereas the properties specified below have been attached in execution of a decree passed in the above suit on the _____ day of _____ 191 _____ in favour of _____).

It is hereby ordered that AB be appointed (subject to his giving security to the satisfaction of the Court) the receiver of the said property and of the rents, issues and profits thereof under Order XL of the Code of Civil Procedure, 1908, with all powers under the provisions of that order, except that he shall not without leave of the Court (1) grant leases for a term exceeding three years or (2) institute suits in any Court (except suits for rent) or (3) institute appeals in any Court (except from a decree in a rent suit) where the value of the appeal is over Rs. 1,000 or (4) expend on the repairs of any property in any period of two years more than half of the net annual rental of the property to be repaired, such rental being calculated at the amount at which the property to be repaired would be let when in a fair state of repair, provided that such amount shall not exceed Rs. 1,000.

And it is further ordered that the ^{parties} ~~parties~~ defendants to the above suit and all persons claiming under them do deliver up quiet possession of the properties, moveable and immoveable, specified below together with all leases, agreements for lease, kabuleats, account books, papers, memoranda and writings relating thereto to the said receiver. And it is further ordered that the said receiver do take possession of the said property, moveable and immoveable, and collect the rents, issues and profits of the said immoveable property, and that the tenants and occupiers do attorn and pay their rents in arrear and growing rents to the said receiver. And it is further ordered that the said receiver shall have power to bring and defend suits in his own name and shall also have power to use the names of the plaintiffs and defendants where necessary. And it is further ordered that the receipt or receipts of the said receiver shall be a sufficient discharge for all such sum or sums of money or property as shall be paid or delivered to him as such receiver.

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And it is further ordered that the said receiver do out of the first monies to be received by him pay the debts due from the said and shall be entitled to retain in his hands the sums of Rs. for current expenses, but subject thereto shall pay his net receipts, as soon as the same come to his hands, into Court to the credit of this suit. He shall once in every months file his accounts and vouchers in Court, the first account to be filed on the day of and to be passed on the day of . He shall be entitled to commission at the rate of Rs. per cent. on the net amounts collected by him or to the sum of Rs. per month (or as the case may be) as his remuneration (or he shall act without any remuneration).

And it is further ordered (where an additional office establishment is required) that the said receiver shall be allowed to charge to the estate in addition to his own office establishment the following further establishment :—

(Here enter specification of property.)

Given under my hand and the seal of the Court, this day of 191

Appendix G to Schedule I.

Form No. 6.—*Insert the following note in red ink in Form No. 6, namely :—*

"Also take notice that if an address for service is not filed before the aforesaid date, this appeal is liable to be heard and decided as if you had not made an appearance."

Form No. 6-A.—*In Appendix G, insert the following as Form No. 6-A :—*

FORM No. 6-A (Order XLI-A, rule 2).

NOTICE TO RESPONDENT.

(Cause title.)

Appeal from the of the Court
of dated the day
of
To

Respondent.

Take notice that an appeal from the above decree (order) has been presented by the abovenamed appellants and registered in this Court, and that if you intend to defend the same you must enter an appearance in this Court and give notice thereof to the appellant or his pleader within 25 days after service of this notice on you.

If no appearance is entered on your behalf by yourself, your pleader or some one by law authorized to act for you in this appeal, it will be heard and decided in your absence

The address for service of the appellant is that of his pleader Mr. A. B. of (insert address) Madras.

(If the appellant appears in person, insert his address for service)

Given under my hand and the seal of the Court, this day of 19 .

Registrar.

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App. IV. [Interlocutory application No. of 19 has been made by appellant, and execution has been stayed (or other order made) by order dated the day of 19].

Form No. 6-B.—*In Appendix G, insert the following as Form No. 6-B :—*

FORM No. 6-B (Order XLI-A, rule 3).

MEMORANDUM OF APPEARANCE.

(Cause title.)

Take notice that the Respondent intends to appear and defend the above appeal, and that his address for service of all notices and process is (insert address.)

The said respondent requires a list of the papers which the appellant proposes to translate and print.

Dated the day of 19 .

(Signed) C. D.,
Vakil for Respondent.

To the Registrar, High Court of Judicature, Madras.

Appendix H to Schedule I.

Form No. 11.—*Substitute the following for Form No. 11 of Appendix II :—*

FORM No. 11.

NOTICE TO GUARDIAN APPOINTED OR DECLARED, OR TO FATHER OR OTHER NATURAL GUARDIAN, OR TO THE PERSON IN CHARGE OF THE MINOR.

[Order XXXII, rule 3 (5).]

(Title.)

To

Guardian appointed or declared, or father or other natural guardian, or person in charge of the minor.

Whereas an application has been presented on the part of the in the above suit for the appointment of a guardian for the suit for the said minor, you are hereby required to take notice that, unless within days from the service upon you of this notice an application is made to this Court for the appointment of you or of some friend of the said minor to act as ^{her} guardian for the purposes of the said suit, the Court will proceed to appoint some other person to act as guardian of the said minor for the purposes of the said

Given under my hand and the seal of the Court, this day of 191 .

Form No. 11-A.—*In Appendix H, insert the following Form as Form No. 11-A :—* **App. IV**

FORM No. 11-A.

NOTICE TO PROPOSED GUARDIAN.

[Order XXXII, rule 4 (3).]

(Title.)

To

residing at

Take notice that the abovenamed petitioner has made an application to this Court to appoint you guardian for the suit of _____ minor defendant in _____ No. _____ of 191 _____ and that the said application will be heard on the day of _____ next.

Given under my hand and the seal of the Court, this _____ day of 191 _____

Form No. 14.—*For Form No. 14 of Appendix H, substitute :—*

FORM No. 14.

REGISTER OF ORDINARY SUITS INSTITUTED.

Court—

• Year—

Instructions.

If the suit has been received by transfer, or instituted under Order XXXVII, Schedule I, C.C.P., a note should be made to that effect at the head of the page.

2. If a suit is remanded under rule 23, Order XLI, or restored to file under rule 9 or rule 13, Order IX, Schedule I, C.C.P., note under item 2. the date of restoration to file.

3. Under the head "*Particulars of claim*" enter particulars required by clauses (g) and (h) of rule 1, Order VII, Schedule I, C.C.P., and also the *value* of the suit as required by clause (i) of that Order and with special reference to Judicial Statements Nos. VII and VIII and H.C. Circulars Nos. 1054 of 1870 and 2253 of 1894. Entries under heads 3, 4 and 5 should be full, for embodiment in the decree, as required by rule 6, Order XX, Schedule I, C.C.P.

4. Note carefully the new heads 8 and 10 and fresh additions to heads 9 and 12.

5. The certified copies of Judgment and Decree in Second Appeal sent to the lower Appellate Court should be forwarded by it to the Court of First Instance which will return them to the former Court after recording the necessary entries under head 9 of this Register.

6. A note should be made of all parties brought on or struck off the record under Order I or XXII, Schedule I, C.C.P., and also of any withdrawal of the claim or a portion of the claim against any of the defendants.

App. IV. 7. Any amendments or alterations made during the progress of the suit in the value or particulars of the claim or as to the date or place of cause of action should appear under head 5.

1. Ordinary Suit No. of 191 .
2. Date of { Presentation.
Filing.
3. PLAINTIFF—Name, description and place of abode.
4. DEFENDANT—Name, description and place of abode.
5. PARTICULARS OF CLAIM—*Claim for*
Cause of action arose at on
6. Date for *Defendant's first appearance*.
Vakil for { Plaintiff.
Defendant.
7. Date of JUDGEMENT and result.
8. Number of application for review (or re-hearing) with result and date.
Fresh Judgment, if any, with date.
9. First Appeal No. of 191 . Result with date.
Second Appeal No. of 191 . Result with date.
10. Note of any orders passed under rule 11, Order XX, rule 2, etc., Order XXI,
Schedule I, C.C.P.
11. *Execution—*

No.	Date of application.	Order and date.	Against whom.	For what, and amount, if for money	Amount of costs.		
					Rs.	A.	P.

12. *Return of Execution—*

Amount paid into Court.			Persons arrested.	Minute of other return than payment of arrest and date of every return, including entry of order in appeal with date.
Rs.	A.	P.		

Form No. 15.—*Add the following as Form No. 15 in App. H :—*

FORM No. 15.

REGISTER OF SMALL CAUSE SUITS INSTITUTED.

Court—

Year—

Instructions.

If the suit has been received by transfer or remanded or restored to file, a note should be made to that effect at the head of the page.

2. Under the head "5. *Particulars of claim*," enter particulars required by *clause (g) and (h)* of Rule 1, Order VIII, Schedule I, C.C.P., and also the *value* of the suit as required by *clause (1)* of that order. Entries under heads 3, 4 and 5 should be full, for embodiment in decrees, as required by Rule 6, Order XX, Schedule I, C.C.P.

3. A note should be made of all parties brought on or struck off the record under Order I or XXII, Schedule I, C.C.P.

4. Any amendments or alterations made during the progress of the suit in the value or particulars of the claim or as to the date or place of cause of action should appear under head 5.

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1. *Small Cause Suit No.* of 191 .
2. Date of { Presentation.
Filing.
3. PLAINTIFF—Name, description and place of abode.
4. DEFENDANT—Name, description and place of abode.
5. PARTICULARS OF CLAIM—*Claim for*
Cause of action arose at on
6. Date for *Defendant's first appearance*.
- Vakil for { Plaintiff.
Defendant.
7. JUDGMENT, date and result.
8. Number of application for review (or re-hearing) with result and date
Fresh Judgment, if any, with date.
9. Revision Case No. of 191 with result and date.
10. Note of proceedings, if any, taken under Rule 11, Order XX, Rule 2, etc., Order
XXI, Schedule I, C.C.P.
11. *Execution—*

No.	Date of application.	Order and date.	Against whom.	For what, and amount, if for money	Amount of costs.		
					RS.	A.	P.

12. *Return of Execution—*

Amount paid into Court.			Person arrested.	Minute of other return than payment of arrest, and date of every return.
RS.	A.	P.		

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Form No. 16.—Add the following as Form No. 16 in App. H. :-

FORM No. 16. REGISTER OF SUITS DISPOSED OF.

Instructions.

1. Separate registers must be kept for ordinary and small cause suits.
2. If the presiding officer of the Court is invested with extended small cause suits, the date to be entered in column 3 will always be the latest date. In the case of suits restored to file, the date of original institution should be entered.
3. The date to be entered in column 3 will always be the latest date. In the case of suits restored to file, the date of original institution should be entered.
4. When a suit is, after contest, compromised or withdrawn, a note of the fact should be made in the column of remarks. It should also be stated whether the decree is appealable, and if so, to what Court.

Disposed of																Remarks.		Corresponding columns of Statute No. IX Part I (e).										
Without contest.			With contest.				Actual number of suits intervening between institution and disposal.						Amount decreed.		30	31	32	33	34	35								
Ex parte.	Decreed on remission to satisfaction.	Decreed on oath.	Decreed after trial.	For defendant.	In whole or part for plaintiff.	For defendant.	In whole or part for plaintiff.	For defendant.	In whole or part for plaintiff.	For defendant.	In whole or part for plaintiff.	For defendant.	In whole or part for plaintiff.	For defendant.							In whole or part for plaintiff.	For defendant.	In whole or part for plaintiff.	For defendant.	In whole or part for plaintiff.			
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29
																					</							

Rules—Mad.

App. IV. Form No. 17.—Add the following as Form No. 17 in App. H :—

FORM No. 17.

REGISTER OF CIVIL MISCELLANEOUS CASES RECEIVED

(ON THE SIDE).

Court—

Year—

Instructions.

1. In this register must be entered all cases ordered by H. C. Circular No. 557 of 1888 to be shown as miscellaneous applications for purposes of Judicial Statement No. IX, Part 2, as well as cases of contempt of Court (*vide* H. C. Circular No. 2928 of 1892).

2. In the matter of references under the Land Acquisition Act, enter in column 3 the number and date of letter of reference, in column 4 the designation of the officer making the reference, in column 5 the name of the claimant, and in column 6 whether the reference is under section 18, 29 or 30 of the Act.

3. In the matter of references under section 16 of Madras Regulation III of 1802, enter in column 3 the number and date of letter of reference, in column 4 the designation of the officer making the reference and the name of the deceased, in column 5 the name of the claimant, if any, in column 6 the words "Section 16, Madras Regulation III of 1802," and in the last column the number and date of reference, if any, made to Government and its result.

Number of miscellaneous cases.	Date of presentation.	Number of connected case, if any.	Name of petitioner, if any, and of his vakil.	Name of defendant and of his vakil.	Purport of case and section of law.	Final order with date.	Number of appeal with result and date.
1	2	3	4	5	6	7	8

Form No. 18.—Add the following as Form No. 18 in App. H :—

FORM No. 18.
REGISTER OF MISCELLANEOUS CASES DISPOSED OF:

FORM No. 18.

Instructions.

These actions.

1. This register will show all miscellaneous cases of every kind, whether instituted on the application of parties or of the Court's own motion, including cases of contempt of Court (H. C. Circulars Nos. 557 of 1888 and 2928 of 1892).

2. The date to be entered in column 3 will always be the latest date. In the case of petitions restored to file, the date of original institutions should be entered, and the date of restoration noted in the column of remarks.

Serial No.	Number of the miscellaneous case disposed of.	Date of institution, or of receipt of the order of transfer.	Date of disposal.	Transferred or registered as suit.	Disposed of										Remarks.	Actual number of days intervening between institution and disposal	Corresponding columns to Statement No. IX, Part 2 (c).																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																						
					Without contest.			With contest.				Party committed for contempt of Court.	Uncontested (columns 7 to 10).	Contested (columns 11 to 15).																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																									
					Without trial.	Ordered.	Dismissed.	Ex-parte	Order on reference to arbitration.	On oath.	After trial.																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																												
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App. IV. **Form No. 19.**—Add the following as Form No. 19 in App. H :—

REGISTER OF EXECUTION PETITIONS RECEIVED
(ON THE SIDE).

Year—

Applications for transmission of decrees for execution beyond the jurisdiction of the Courts passing them should not be entered in this Register, but must be entered in the Register of Miscellaneous Cases Received (Form No. 17).

Number of Execution Petition.	Date of presentation.	Number of connected suits and of last pre- vious application.	Name of decree-hold- er and of his plea- der.	Name of judgment- debtor and of his pleader.	Terms of decree or order to be execut- ed with date of any proceeding from which time runs for this application.	Made of assistance, and section of Code or law prescribing it.	Order, with reasons, for closing of pro- ceeding, under this application and date.	Number of appeal with result and date.
1	2	3	4	5	6	7	8	9

FORM No. 20.

Year—

[illegible]

Rules—Mad.

Form No. 21.—Add the following as Form No. 21 in App. H :—

App. IV.

FORM No. 21.

REGISTER OF EXECUTION PETITIONS DISPOSED OF.

Court—

Year—

Instructions.

1. The date to be entered in column 4 will always be the latest date. In the case of petitions restored to file, the date of original institution should be entered, and the date of restoration noted in the column of remarks.

2. Note in the remarks column the number of judgment-debtors imprisoned in each case, the value of decree under which judgment-debtor was imprisoned and date when sent to jail and date of release, for the purposes of columns 34 to 37 of Statement No. XI.

Serial Number.		Number of the execution petition disposed of.	Number of connected case.	Date of institution or of receipt of the order of transfer.	Date when proceedings were finally closed.	Withdrawn, rejected or not prosecuted.	Transferred.	Application on which proceedings were finally closed.			Amount.		How the Judgment-debtor	
								Satisfaction obtained.		Execution wholly infructuous.	Involved in execution applications disposed of.	Realized.	Imprisoned.	Arrested but released.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	
					6	7	8	9	10					
										Rs.	Rs.			

decree was executed.

Movable property.		Immovable property.			Possession given of.		Remarks.						
Sold.	Attached but released (Rule 55 or 60 Order XXI).	Sold.	Attached but released (Rule 55 or 60 Order XXI).	Otherwise dealt with (Section 79; or Rule 53, Order I, or Schedule III).	Movable (Rule 31, Order XXI).	Immovables (Rules 35 and 36, Order XXI).	Specific performance enforced.	Petition effected (Section 54, C.O.P.).	Execution otherwise effected.	Actual number of days intervening between institution and disposal.	(If the petition is only for part satisfaction of the decree, note the fact.)		
15	16	17	18	19	20	21	22	23	24	25	Corresponding columns to Statement No. XI, Part I.		
19	20	21		23	24	25	26	27	28	29			

Rules—Mad.

App. IV. Form No. 22.—Add the following as Form No. 22 in App. H :—

FORM No. 22.

REGISTER OF APPEALS RECEIVED.

Court—

Year—

Instructions.

Appeals from orders which have the force of decrees should be shown in this register and not in the Register of Miscellaneous Appeals Received (Form No. 24) in which appeals from other orders should be entered—*vide* H. C. Circular No. 3400, dated 22nd December 1893, and section 2 (2) and Rule 5, Order XXXVI, Schedule I, C.C.P.

2. Under item “5. Particulars of suit and decree appealed from” enter also nature and value of appeal, with special reference to the information required by annual statement No. X, Parts 3 and 4, and H. C. Circulars Nos. 1034 of 1870 and 2253 of 1894. In cases of appeals against orders having the force of decrees substitute the word “Order” for “Decree” and add after date the words “*passed under C.C.P. on M.P. No. of 1 .*”

3. If the appeal has been received by transfer, a note should be made to that effect at the head of the page.

4. If an appeal is remanded under Rule 23, Order XLI, Schedule I, C.C.P., note under head 2 the date of restoration to file.

5. A note should be made of all parties brought on or struck off the record under Order I or XXII, Schedule I, C.C.P.

1. Appeal No. of 191 .

2. Date of { Presentation.
Filing.

3. APPELLANT—Name, description and place of abode.

4. RESPONDENT—Name, description and place of abode.

5. PARTICULARS OF SUIT AND DECREE APPEALED AGAINST. Decree of
the Court of dated 191
in Original Suit No. of 191 .

Value of relief

Particulars of relief.

Claimed.

Decreed.

Appealed against.

RS. A. P.

RS. A. P.

RS. A. P.

6. Hearing if any, under Rule 11, Order XLI, Schedule I, C. C. P., and result with date.

7. Date for Respondent's first appearance.

Vakil for { Appellant.
Respondent.

8. JUDGMENT, result and date.

9. Objections, under Rule 22, Order XLI, Schedule I, C.C.P., if any, filed by whom, and value.

10. Number of Application for review (re-hearing) with result and date.
Fresh Judgment, if any, with date.

11. Second Appeal No. of 191 . Result with date.

Rules—Mad.

App. IV.

Form No. 23.—Add the following as Form No. 23 in 'App. H :—

FORM No. 23.
REGISTER OF APPEALS DISPOSED OF.

Court—

Instructions.

Year—

1. There must be three separate registers of appeals disposed of, *viz.*, (1) for money or moveables, (2) under the Estates Land Act, 1908, and (3) for title and other appeals.
2. The date to be entered in column 2 will always be the latest date. In the case of appeals restored to file, the date of original institutions should be entered.

2. The date to be entered in column 2 will always be the latest date. In the case of appeals restored to file, the date of original institutions should be entered.

Serial number.	No. of the appeal disposed of.	Date of institution or of the receipt of the order of transfer.	Date of disposal.	Data transferred to another Court.
Dismissed under Rule 11, Order XII.	Dismissed for default or otherwise not prosecuted.	Decree confirmed.	Decree modified.	Decree reversed.
Without contest.	Demand.	On oath, or by arbitration or compromise.	Decree confirmed.	Decree modified. Decree reversed. <i>Reversed.</i>
With contest.	Actual number of days intervening between institution and decree.	Uncontested (columns 8 to 11).	Contested (columns 12 to 16).	Objections under rule 22, Order XIII.
(If appeals are decided on oath, or by arbitration or compromise, note whether the decree appealed against was confirmed, modified or reversed).	Corresponding columns of Statement No. A, Part I (c).			

Rules—Mad.

App. IV. Form No. 24.—*Add the following as Form No. 24 in App. H :—*

FORM No. 24.**REGISTER OF MISCELLANEOUS APPEALS RECEIVED.**

Court—

Year—

Instructions.

Appeals from orders which have the force of decrees *should not be shown* in this register. Appeals from other appealable orders only should find place in this register.

2. If necessary, give value of appeal under head,

3. A note should be made of all parties brought on or struck off the record under Order I or XXII, Schedule I, C.C.P.

1. *Miscellaneous Appeal No.* of 191 .

2. Date of { .

3. APPELLANT—Name, description and place of abode.

4. RESPONDENT—Name, description and place of abode.

5. PARTICULARS OF ORDER APPEALED AGAINST—*Order of the Court o*
dated 191 , *passed*
on M.P. No. of 191 , *in Original Suit No.*
 of 191 .
 Appeal under of

6. Hearing, if any, under Rule 11, Order XLI, Schedule I, C.C.P., and result with date.

7. *Date for Respondent's first appearance.*

Vakil for .. { Appellant.
 { Respondent.

8. JUDGMENT—Result and date.

9. Objections under Rule 22, Order XLI, Schedule I, C.C.P., if any, filed by whom.

10. Number of application for review (or re-hearing) with result and date.

Fresh Judgment, if any, with date.

Form No. 25.—Add the following as Form No. 25 in App. H :—

FORM No. 25.
REGISTER OF MISCELLANEOUS APPEALS DISPOSED OF.

Year—

Court—

Instructions.

The date to be entered in column 2 will always be the latest date. In the case of appends restored to file, the date of original institution should be entered.

[illegible]

APPENDIX V.

Rules made by the Chief Court of the Pinjab under s. 122.

Order II, rule 7.—After rule 7 of Order II, insert :—

8. (1) Where an objection, duly taken, has been allowed by the Court, the plaintiff shall be permitted to select the cause of action with which he will proceed and shall within a time to be fixed by the Court, amend the plaint by striking out the remaining causes of action.

(2) When the plaintiff has selected the cause of action with which he will proceed, the Court shall pass an order giving him time within which to submit amended plaints for the remaining causes of action and for making up the Court-fees that may be necessary. Should the plaintiff not comply with the Court's order, the Court shall proceed as provided in rule 18 of Order VI and as required by the provisions of the Court-Fees Act.

Order V, rule 10.—To rule 10, Order V, the following proviso shall be added :—

“ Provided that in any case if the plaintiff so wishes, the Court may attempt to serve the summons in the first instance by registered post instead of in the mode of service laid down in this rule : and provided always that should the defendant not appear in answer to the summons so issued, the Court shall have service effected in accordance with the provisions of this Order.”

Order VII, rule 2.—In the second paragraph of rule 2 of Order VII after the words “ and the defendant ” insert “ or for moveables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate ” after the words “ the amount ” insert “ or value.”

Order IX, rule (1).—To rule 9 (1) the following proviso shall be added :—

“ Provided that the plaintiff shall not be precluded from bringing another suit for redemption of a mortgage, although a former suit may have been dismissed for default.”

Order XXI, rule 29 A.—After rule 29 of Order XXI, the following rule shall be inserted :—

“ 29 A. When a suit under rule 63 of this Order is pending, the Court in which such suit is filed may, if it considers that execution of the former decree should be stayed, intimate the fact to the executing Court, which shall thereupon stay execution until the suit is decided.”

Order XXI, rule 75.—In r. 75 after the word “ stored ” shall be added the words “ or can be sold to greater advantage in an unripe state, such as green wheat or gram.”

Order XXX, rule 1.—To rule 1 of Order XXX the following explanation shall be added :—

Explanation.—“ This rule applies to a joint Hindu family trading partnership.”

Order XXXII, rule 1.—To rule 1 the following paragraph shall be added :—

“ Such person may be ordered to pay any costs in the suit as if he were the plaintiff.”

Appendix B.

App. V.

FORM No. 11.

Order V, rule 18, Schedule I, App. B, Form No. 11.—For the 3rd and 4th parts of (3) in the form read :—

(3) The said _____ and his house in
which he ordinarily resides being personally known to me
pointed out to me by _____

I went to said house in _____ and there on
the day of _____ 19____, at _____ o'clock
fore
in the _____ noon, I did not find the said _____
after

I enquired from { (a) _____ } neighbours.
{ (b) _____ }

I was told that _____ had gone to
_____ and would not be back till _____.

Signature of Process Server.

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